(37,465)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 768

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 27, 1933

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

WELLINGTON D. RANKIN, Esq., of Helena, Montana, United States Attorney for the District of Montana, HOWARD A. JOHNSON, Esq., of Butte, Montana, and ARTHUR P. ACHER, Esq., of Helena, Montana, Assistant United States Attorneys for the District of Montana,

Attorneys for the United States of America, Plaintiff and Appellee.

L. O. EVANS, Esq., of Butte, Montana, D. M. KELLY, Esq., of Butte, Montana, WARREN NICHOLS, Esq., of Chicago, Illinois, and JOHN A. GROENEVELD, Esq., of Butte, Montana,

Attorneys for Defendant and Appellant.

In the District Court of the United States for the District of Montana.

No. 527.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED, that on the 23d day of August, 1929, plaintiff filed its complaint herein, in the words and figures following, to wit:

In the District Court of the United States for the District of Montana, Butte Division. [1*]

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

COMPLAINT.

The plaintiff complains and alleges:

1. That the defendant is, and at all times herein mentioned was a corporation duly incorporated under the laws of Montana; and during all of said otimes was the owner of a railroad extending from Butte to Anaconda, Montana.

2. That between January 1, 1918, and September 27, 1918, inclusive, said railroad was operated under Federal control, and for the remainder of the Federal control period, to wit; from September 28, 1918, to February 29, 1920, inclusive, the defendant privately operated the same and engaged as a common carrier in general transportation, and during said time connected with the Northern Pacific Railway, a railroad under Federal control.

*Page-number appearing at the foot of page of original certified Transcript of Record.

3. That during said last-mentioned period the defendant received from the operation of said railroad, railway operating revenues amounting to $2,079,693.08; and that during said period the railway operating expenses, railway tax accruals, and net debits from equipment and joint facility rents together amounted to $1,840,167.95; by reason whereof defendant during said period received from the operation of said railroad a net railway operating income of $239,525.13.

4. That on February 9, 1922, the Interstate Commerce Commission, by a general ruling (Construction of the Word "Deficit," 66 I. C. C. 765, Finance Docket No. 1600), construed the word "deficit," as used in paragraph (a) of Section 204 [2] of the Transportation Act, 1920, to mean a deficiency or decrease in income under private operation in the Federal control period, as compared with the average income for corresponding portions of the test period, to wit: the three-year period ending June 30, 1917.

5. That thereafter, and prior to March 20, 1925, defendant made and filed with the Interstate Commerce Commission its claim wherein and whereby it asserted that under the provisions of said Transportation Act, and during the last-mentioned period, it sustained a deficit in the private operation of said railroad amounting to the sum of $600,527.35; and demanded that said Commission certify to the Secretary of the United States Treasury its alleged deficit in said sum.

6. That thereafter and on March 20, 1925, the Interstate Commerce Commission adjusted the

claim of defendant for allged deficit, and notwithstanding the fact that the railway operating revenues of said railroad during said period of private operation exceeded the railway operating expenses, taxes, and net debits from equipment and joint facility rents, said Commission, conformably to its ruling of February 9, 1922, aforesaid, decided that in contemplation of said Transportation Act, the defendant, during said period of private control, had sustained a deficit of $487,116.31, and thereupon certified to the Treasurer of the United States that defendant was entitled to receive said sum from the United States Treasury and further certified that there was nothing due from defendant to the President (as operator of the transportation systems under Federal control) on account of traffic balances or other indebtedness.

7. That on March 21, 1925, the certificate of the Commission (B–300) was transmitted by the Treasury to the Comptroller-General [3] of the United States, with recommendation that warrant be issued in favor of the defendant for the last-mentioned sum, payable from the appropriation "Reimbursement to Carriers of Deficits during Federal Control."

8. That pursuant to the certificate of the Comptroller-General for settlement of said claim, the Treasury issued a warrant in said sum which was transmitted to the Treasurer of the United States and by him paid to the defendant in full on or about March 26, 1925.

9. That the construction placed by the Interstate Commerce Commission upon the word "deficit" as set forth in paragraph 4 hereof was an erroneous and unwarranted construction and not in harmony with the accepted use of said word or of its use as found elsewhere in said Transportation Act, in that by said construction it was necessary to hold that defendant's said railroad, between September 28, 1918, and February 29, 1920, inclusive, sustained a deficit in net railway operating income, whereas, in fact, its railway operating revenues during said period, exceeded its railway operating expenses, taxes, and net debits from equipment and joint facility rents by the sum of $239,525.13.

10. That thereafter, and on October 17, 1925, said Interstate Commerce Commission duly overruled its general order of February 9, 1922, aforesaid, by which the word "deficit" was construed as described in paragraph 4 hereof, and held the meaning of said word to be the excess of operating expenses over railway operating revenues computed as provided, in said Section 204, incurred by a carrier for that portion (as a whole) of the period of Federal control during which it operated its own railroad, and without reference to its net earnings during the test period or any other time. (Deficit Status of Bingham & Garfield Railway Company, 99 I. C. C. 724, [4] Finance Docket No. 2500).

11. That the meaning last given to the word "deficit" by said Commission, as set forth in the

next preceding paragraph hereof, is its true meaning, and conforms to its accepted usage and is in harmony with the use thereof made elsewhere in said Transportation Act.

12. That after issuing to defendant the certificate above mentioned, and on January 8, 1927, said Commission issued an order reopening the proceeding for the adjustment of defendant's said claim for deficit, and notified defendant to show cause why said certificate of the Commission should not be revoked and the said claim canceled. A hearing on said order was duly held before the Interstate Commerce Commission on March 1, 1927, at which the defendant was represented by counsel and objected to the reopening of said proceeding.

13. That after examining briefs filed at said last-mentioned hearing, and being fully advised in the premises, the Interstate Commerce Commission, on March 7, 1927, by order duly made and entered upon its records, duly revoked and canceled the certificate issued by it to the defendant on March 20, 1925, as aforesaid, and dismissed said proceeding; of all of which defendant was given due and timely notice.

14. That thereafter and on or about June 8, 1928, demand was made upon defendant by the Under Secretary of the Treasury of the United States for the repayment of said sum of $487,116.31; but that payment of said sum, or any part thereof, has been and still is wholly refused by defendant.

WHEREFORE plaintiff prays judgment against the defendant for the sum of $487,116.31, together with lawful interest thereon from and after June 8, 1928, and for the costs of this action.

WELLINGTON D. RANKIN,
United States Attorney for the District of Montana. [5]

United States of America,
District of Montana,—ss.

Wellington D. Rankin, being duly sworn, deposes and says: That he is the United States Attorney for the District of Montana; that he has read and knows the contents of the foregoing complaint, and that the same are true according to the best of his knowledge, information and belief.

WELLINGTON D. RANKIN.

Subscribed and sworn to before me this 23d day of August, 1929.

[Notarial Seal] ARTHUR P. ACHER,
Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires June 30, 1930.

Filed August 23, 1929.

THEREAFTER, on the 6th day of September, 1929, the demurrer of the defendant to the complaint of the plaintiff was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

DEMURRER.

Comes now the defendant, Butte, Anaconda & Pacific Railway Company, a corporation, and demurs to the complaint of plaintiff herein on the following ground and for the following reasons:

I.

That said complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this demurring defendant.

L. O. EVANS,
WARREN NICHOLS,
D. M. KELLY, and
JOHN A. GROENEVELD,
Attorneys for Defendant. [6]

Service of all subsequent papers, except writs and process, may be upon attorneys for the defendant at their address, 616 Hennessy Building, Butte, Silver Bow County, Montana.

State of Montana,
County of Silver Bow,—ss.

L. O. Evans, being first duly sworn, on oath deposes and says: That he is one of the attorneys of record for the defendant in the above-entitled cause, and that the above and foregoing demurrer has not been interposed for delay, and he certifies that in his judgment the same is well founded in law.

L. O. EVANS.

Subscribed and sworn to before me this 6th day of September, A. D. 1929.

[Notarial Seal] J. A. LIVINGSTON, Jr.
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires Feb. 26th, 1932.

Service of the foregoing demurrer acknowledged, and copy received, this 12th day of September, 1929.

WELLINGTON D. RANKIN,
United States Attorney for the District of Montana.

Filed September 13, 1929.

THEREAFTER, on the 26th day of February, 1930, the order of the above-entitled court overruling the defendant's demurrer to the plaintiff's complaint was entered in the minutes of the court, in the words and figures following, to wit:

(Title of Court and Cause.)

ORDER OVERRULING DEMURRER TO COMPLAINT.

This cause came on regularly this day for judgment and decision of the court, said cause having heretofore been duly argued and [7] submitted on defendant's demurrer to the complaint herein. Thereupon, after due consideration court ordered

that said demurrer be and is overruled. Memo decision filed.

C. R. GARLOW,
Clerk.
By L. R. Polglase,
Deputy.

Entered February 26, 1930.

THEREAFTER, on the 26th day of February, 1930, the decision of the above-entitled court, by written opinion, overruling defendant's demurrer to plaintiff's complaint was duly filed herein, in the words and figures, following, to wit:

(Title of Court and Cause.)

DECISION OVERRULING DEMURRER TO COMPLAINT.

Upon this demurrer to the complaint to recover money alleged to have been paid by mistake, the issues are the proper construction of the phrase, "which sustained a deficit in its railway operating income," in Par. A, Sec. 204, T. 49, Section 73, U. S. C. A., the Transportation Act of 1920, and the effect of the Interstate Commerce Commission's decisions *infra*. It appears that at all material times defendant operated a railroad as a common carrier, which during its period of Federal control connected with a railroad under such control.

In those halcyon days when "he kept us out of war," defendant's road earned a substantial net

railway operating income. Came an election won, entry into the war, Federal control and of defendant's road, release of it to defendant which operated it the remainder of the period of such control, and a net railway operating income but less than before control or during the "test period" in Par. a defined.

Followed the Transportation Act of 1920, the Interstate Commerce Commission's construction of the mooted phrase aforesaid to import [8] a red ink balance, self-reversal to import mere decrease of income whether or not in the red, defendant's claim for reimbursement on account of its decrease aforesaid, the Commission's certification of it in amount $487,116.31, payment by plaintiff, again the Commission's reversal of self to again construe said phrase to intend a red balance, its rehearing and rejection of defendant's claim, plaintiff's demand for reimbursement by defendant refused, and this action.

The Commission's decision aforesaid scanned, indicate changes in its personnel may operate much as in appellate courts.

From any decision herein, appeal is certain and justifies brevity.

The Federal Control Act guaranteed all roads controlled compensation equivalent to their average annual operating income during the three years ending June 30, 1917, the "test period" aforesaid. Any excess operating income vested in the United States. Roads not taken under control or from control released, shifted for themselves as before control,—entitled to all their income but no more,

be it more or less than the test period income. The Transportation Act terminating control, amongst other things guaranteed to roads under control an operating income for the ensuing six months equal to their compensation under control, plus certain sums for additions, betterments and extensions, by the carrier made; and to roads circumstanced as defendant's, an operating income equivalent to that of the test period, plus the like certain sums awarded the controlled carriers as aforesaid, any excess income to be paid to the United States. In these provisions for carriers like defendant's occurs the phrase about which revolves the case at bar. It also occurs repeatedly elsewhere in the Transportation Act. And it is conceded (even by defendant save in respect to Par. a) that always it imports a red ink [9] balance, not a mere decrease in operating income but income less than outlay. Evidently, the Transportation Act designed that the controlled roads should fare as well in the guaranty period as during control, and the roads like defendant's, as well as in the test period. To these latter roads the Act extended further benefits, to the extent that if any such carrier "sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal Control during which it operated its own railroad," the Interstate Commerce Commission "shall ascertain for every carrier" its "deficit in railway operating income, if any, and its railway operating income, if any," for every month of the carrier's operation during the period of Federal control, and the like derived from averaging the three corre-

sponding months of the test period; that to the carrier will be credited any difference between results for corresponding months which are to the advantage of the test period, and to the United States, any like differences to the advantage of the control period; and that to the extent that the sum of the former exceeds that of the latter, the Commission shall certify it to the Secretary of the Treasury, whose warrant therefor shall be paid to the carrier. See Par. b–g, Sec. 204, T. 49, U. S. C. A.

Thus Par. a defines a general class of roads which may be entitled to indemnity, and pars. b–f, the computations by which any particular road so entitled is identified and the amount of indemnity ascertained. The first is the grant, and principal, the last, is the means of identification of the grantee, and subsidiary. In its interpretation of "deficit in its railway operating income" in Par. a as importing mere decrease of income and not an excess of outlay over income or a red balance, the Interstate Commerce Commission recognized it was departing from the clear import of [10] the same term repeatedly elsewhere appearing in the Act. This it sought to justify by considerations of otherwise disparity, inequity, hardship, injustice and absurdity, and of history, object, committee reports, etc.

For this construction on like reasoning defendant contends.

The argument may demonstrate that in the particular roads to be indemnified Congress ought to

have included defendant's and its like, but it fails to persuade that Congress did.

It may be that the term in Par. a, "deficit in its railway operating income," is inaccurate to express the idea of outlay exceeding income or a red balance; but Congress having so used it some half-score other places in the Act, must be taken to have likewise used it in Par. a, no different intent clearly appearing. In the matter of grants of public property, any and all doubts are resolved against the grantees. Those who claim to be of the class of beneficiaries, must find their warrant in express language of the granting act, and not at all in strained, ingenious and unusual interpretations and inferences. Had Congress intended to include roads circumstanced as defendants, it could have plainly said so and did not. Moreover, to include the latter roads, the mooted term in Par. a is wholly unnecessary and superfluous. Omit it, and they are included. On the contrary Congress therein stipulated none shall enjoy the bounty conferred save those sustaining a "deficit"; and since its only concern and prime object was successful operation of roads, it provided that the deficit need appear only in "railway operating income" whether or *not was* a deficit in the income as a whole and which might include much from land grants, mines, investments and what not. Hence, the reason for the words descriptive of the deficit, whether or not inaccurate. They distinguish the one variety of income from the other, and are words of restriction. Without them, [11] the

word "deficit" would clearly import a red ink balance in the entire income; with them, it imports a red ink balance limited to part of the entire income, viz., the "railway operating income." And thus did Congress intend.

The House committee report on the Transportation Act is likewise persuasive, in that referring to "deficit in railway operating income," it states that roads sustaining it "shall be paid the amount by which such deficit exceeds the corresponding deficit during the test period," the amount payable determined by comparing "deficit or income during" the control period with the like in the test period. If deficit means decrease in control period income compared with test period income, it must mean decrease in test period income compared with no standard prescribed. Obviously by deficit red ink balances alone make sense and are thus intended.

In so far as it is argued otherwise, for that every month of both control and test period might return a net income though the former less than the latter, and that *any the* said differences by (2) Par. d are to be credited to the carrier and by Pars. f and g ordered to the carrier paid, the answer is any such contingency would disclose the carrier not within the class of beneficiaries by *a* Par. a defined; that (2) Par. d is subsidiary to and cannot extend the granting clause, Par. a, but with (1), (2) and Par. e, serves only for identification and computation; and that it yields to the granting clause and the intent of the statute as a whole.

Those excluded from the grant of indemnity who with propriety might have been included, have no judicial remedy. From any disparity, inequity, hardship, injustice flowing from the granting act, Congress alone can relieve and to it any appeal must be made. Its discretion controls in respect to public grants by it made. If anything *contra* [12] in U. S. vs. Coms., 11 Fed. (2) 554, it is not apparent in the report. The notable feature seems to be that the court disclaiming jurisdiction, lectured the Commission on the law, for which no doubt the Commission is duly grateful.

Defendant further contends that the allowance and certification of its claim by the Interstate Commerce Commission was final and conclusive, that it could not reopen the matter, and that its original certification and payment made are a bar to this action. Many cases are by it cited to the point that where Congress has created a new right and remedy, the decision of any special tribunal provided to vindicate the one and to supply the other is final and beyond judicial review if none has been by Congress authorized. Without review of the citations or attempt to reconcile the irreconcilable, it is believed the instant case comes within the principle that if the special tribunal's decision involves no dispute of fact, and is inspired by and rests upon sheer erroneous construction of the statute, it exceeds this tribunal's authority and the Government can maintain an action at law to recover any money paid by reason of the mistake,—an action not necessarily to review and annul the

decision not mandamus to control discretion, but only to deprive of the benefit of the erroneous decision to compel the beneficiary, to restore what he received, to which he has no right or title, and which in sound morals and good conscience he ought to return. See Talcott vs. U. S., 23 Fed. (2) 901 and citations. Moreover, the Commission in this case was not a special tribunal but a mere auditor in respect to carriers within the statute, to compute and certify the result from the Commission's records and the carrier's reports to it, though doubtless it could receive other evidence. See Great Northern Ry. vs. U. S., 277 U. S. 180. Demurrer overruled.

February 26, 1930.

Filed Feb. 26, 1930.

BOURQUIN, J. [13]

THEREAFTER, on the 28th day of March, 1930, the answer of the defendant to plaintiff's complaint was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

ANSWER.

Comes now the defendant, and for answer to the complaint of plaintiff on file herein, admits, denies and alleges:

I.

Admits the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 14 thereof.

II.

Defendant denies generally and specifically each and every allegation, each and every part, and the whole thereof, contained in Paragraphs 9 and 11 of said complaint.

III.

Answering the allegations contained in Paragraph 10 of said complaint defendant admits that on or about October 17, 1925, said Interstate Commerce Commission filed its report in Finance Docket 2500, Deficit Status of Bingham & Garfield Railway Company, found in Vol. 99, Interstate Commerce Commission Reports, at page 724, wherein it there held and decided that said Section 204 of said Transportation Act, 1920, did not apply to the railroads in said report mentioned.

Except as herein specifically admitted or qualified, defendant denies each and every allegation, and each and every part thereof in said Paragraph 10 contained.

IV.

Answering the allegations contained in Paragraph 12 of said complaint, defendant admits that on or about January 8, 1927, the Interstate Commerce Commission issued an order attempting to reopen [14] the said proceeding, and notified the defendant thereof and to show cause why the certificate of said Commission should not be revoked and the defendant's claim canceled; and in this connection defendant alleges that it appeared specially at said hearing, and by and through its counsel made a special and limited appearance solely for the pur-

pose of objecting to the jurisdiction of the Commission to make or enter any order reopening the said proceedings, or revoking its order, or in any manner making any further order in connection therewith; that said appearance was a special and limited appearance for said purpose and no other, and no other appearance was made in said proceeding on behalf of said defendant.

Except as hereinabove specifically admitted or qualified, defendant denies each and every allegation, and each and every part thereof in said Paragraph 12 contained.

V.

Answering the allegations contained in Paragraph 13 of said complaint, defendant admits that on or about March 7, 1927, the Interstate Commerce Commission by its order attempted to revoke and cancel the certificate issued by it to the defendant on March 20, 1925, and attempted to dismiss said proceeding, and in this connection defendant alleges that at said time and ever since the month of March, 1925, there was no claim or proceeding pending before the Interstate Commerce Commission on behalf of the defendant herein, and that said claim had been adjusted, settled and paid in March, 1925, and thereafter nothing was pending before said Commission concerning which it could make any order in the premises.

Except as hereinbefore specifically admitted or qualified, defendant denies each and every allegation, and each and every part thereof in said Paragraph 13 contained. [15]

VI.

Defendant denies generally and specifically each and every allegation, each and every part thereof and the whole thereof in said complaint contained, and not hereinbefore specifically admitted or denied.

For a first and separate affirmative defense to the complaint of plaintiff herein, the defendant alleges:

I.

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, and is and was the owner and operator of a railroad extending from Butte, Montana, to Anaconda, Montana, as alleged in the complaint.

II.

That between January 1, 1918, and September 27, 1918, inclusive, said railroad was operated under Federal control, and for the remainder of the Federal control period, to wit, from September 28, 1918, to February 29, 1920, inclusive, defendant privately operated the same, and engaged as a common carrier in general transportation, and during said time connected with the Northern Pacific Railway Company, a railroad under Federal control.

III.

That during said last mentioned period the defendant railroad sustained a deficit in private operation of said railroad amounting to the sum of $600,527.35, as defined by Section 204 of the Transportation Act, 1920, and as the word "deficit" was con-

strued by the Interstate Commerce Commission as alleged in Paragraph 4 of plaintiff's complaint herein.

IV.

That following the ruling of the Interstate Commerce Commission, [16] as alleged in said Paragraph 4 of plaintiff's complaint herein, this defendant prepared, made and filed with the Interstate Commerce Commission its claim for the said sum of $600,527.35, and demanded that said Commission certify to the United States Treasury said amount for payment in accordance with the provisions of the Transportation Act, 1920.

V.

That thereafter, and on or about March 14, 1925, the Interstate Commerce Commission caused to be directed to the defendant, through its Treasurer and Auditor, the following proposition of adjustment of said claim:

"INTERSTATE COMMERCE COMMISSION.
BUREAU OF FINANCE.

Washington. VLA:MM
Finance Docket No. 2602.
March 14, 1925.

Mr. P. M. Halloran,
Treasurer and Auditor,
Butte, Anaconda & Pacific Railway Co.,
Anaconda, Montana.

Dear Sir:

I wish to advise that we have completed our analysis of the claim of the Butte, Anaconda & Pacific

Railway Company under section 204 of the Transportation Act, 1920, with the result that we find the amount payable to the carrier for that portion of the period of Federal control during which it operated its property privately, namely, from September 27, 1918, to February 29, 1920, to be $487,116.31, from which there is no amount to be deducted in favor of the Director General as traffic balances or other indebtedness. The amount hereinabove indicated is the amount reported by the Bureau of Accounts as the net credit in favor of the carrier before making the adjustments under the provisions of Paragraph (f) of section 209, required by Paragraph (b) of section 204. We have not found it necessary to make any adjustments under the above-mentioned section.

I am attaching hereto for your signature proposed agreement of acceptance of our ascertainment on the basis hereinabove set forth. If acceptable I shall thank you to execute and file same with the Commission at the earliest date practicable in order that [17] disposition may be made of the case.

Very truly yours,

_____,

Director."

Attachment.

Copy to:

Mr. George H. Parker,
Commerce Counsel,
American Short Line Railroad Association,
1319 F Street, N. W., Washington, D. C."

VI.

That enclosed with the said letter of March 14, 1925, and attached thereto for the signature and approval of the defendant herein was the following agreement of settlement:

"ACCEPTANCE OF ASCERTAINMENT OF THE BUREAU OF FINANCE OF THE INTERSTATE COMMERCE COMMISSION UNDER SECTION 204 OF THE TRANSPORTATION ACT, 1920."

"The Butte, Anaconda & Pacific Railway Company hereby agrees to accept the amount of $487,116.31, ascertained by the Bureau of Finance of the Inter-State Commerce Commission as being the amount payable to it under section 204 of the Transportation Act, 1920, for that portion of the period of Federal control during which it operated its property privately in settlement of all claims against the government under said section 204.

BUTTE, ANACONDA & PACIFIC RAILWAY CO.

By _____"

VII.

That upon the receipt of said letter of March 14, 1925, and of the agreement and release to be signed by the defendant, the defendant caused said agreement to be signed and executed for it and on its behalf by P. M. Halloran, its Treasurer and Auditor, and filed said agreement of settlement with the Interstate Commerce Commission which said Commis-

sion in recognition thereof, and on March 20, 1925, entered its order as follows:

"FINANCE DOCKET No. 2602.

"DEFICIT SETTLEMENT WITH BUTTE, ANACONDA & PACIFIC RY. [18]

"Submitted January 5, 1925. Decided March 20, 1925.

"The amount payable to the Butte, Anaconda & Pacific Railway Company under the provisions of section 204 of the transportation act, 1920, is ascertained to be $487,116.31, from which no amount is deductible as due to the President, as operator of transportation systems under Federal control on account of traffic balances or other indebtedness. Certificate issued.

"GEORGE H. PARKER, WARREN NICHOLS, and P. M. HALLORAN for the Carrier.

"REPORT OF THE COMMISSION.

"DIVISION 4, COMMISSIONERS MEYER, AITCHISON AND EASTMAN, BY DIVISION 4:

"The Butte, Anaconda & Pacific Railway Company, a corporation of the State of Montana, hereinafter termed the carrier, is a steam and electric railroad company which, during the Federal control period, engaged as a common carrier in general transportation, operating a line of railroad between Butte and Anaconda, Mont., approximately 25.3 miles in length, which connected with the Northern Pacific Railway, a railroad under Federal control. It is,

therefore, a carrier within the meaning of paragraph (a) of section 204 of the transportation act, 1920.

"The carrier was under Federal control from January 1, 1918, to September 27, 1918, inclusive, and is entitled to the benefits of section 204 for the period from September 28, 1918, to February 29, 1920, inclusive. Its return under our circular of March 4, 1920, indicated a net credit of $600,527.35 in its favor for the period from September 28, 1918 to February 20, 1920, inclusive. Our examination of its accounts shows the net credit to the carrier for that period to be $487,116.31 before making the adjustments under the provisions of paragraph (f) of section 209, required by paragraph (b) of section 204.

"Consideration has been given by us to the adjustment of maintenance charges and applying, so far as practicable, the rule set forth in the proviso of paragraph (a) of section 5 of the standard contract between the director general and carriers under Federal control, we have fixed the maintenance allowance during the period in question at the amount charged by the carrier.

"We find that there is payable to the carrier under paragraphs (f) and (g) of section 204 of the transportation act, 1920, the sum of $487,116.31, from which no amount is deductible as due to the President, as operator of transportation systems under Federal control, [19] on account of traffic balances or other indebtedness. The carrier has expressed its willingness to accept this amount in final settlement of all its claims against the United States under that section.

"Settlement herein is based upon the commission's report of February 9, 1922, in Finance Docket No. 1600, Construction of the Word 'Deficit,' 66 I. C. C., 765. An appropriate certificate will issue.

"CHAIRMAN AITCHISON did not participate in the disposition of this case."

VIII.

That the Commission thereupon certified to the Treasurer of the United States that the defendant was entitled to receive the said sum of $487,116.31 from the United States treasury, and further certified there was nothing due from the defendant to the President as operator of the transportation system under Federal control (on account of traffic balances or other indebtedness) and thereafter the certificate of the Commission was transmitted by the Treasury to the Comptroller of the United States Treasury with the recommendation that a warrant be issued in favor of the defendant for the said last-mentioned sum, payable from the appropriation "Reimbursement to Carriers of Deficits During Federal Control," and that pursuant to said certificate the Treasury issued a warrant in said sum, which was transmitted to the Treasurer of the United States, and by him paid to the defendant in full on or about March 24, 1925, as a result of the aforesaid action, and pursuant to the order and adjustment made thereon, and that the plaintiff is now estopped from asserting any claim therefor.

For a second and separate affirmative defense to

the complaint of plaintiff herein, the defendant alleges: [20]

I.

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, and is and was the owner and operator of a railroad extending from Butte, Montana, to Anaconda, Montana, as alleged in the complaint.

II.

That between January 1, 1918, and September 27, 1918, inclusive, said railroad was operated under Federal control, and for the remainder of the Federal control period, to wit, from September 28, 1918, to February 29, 1920, inclusive, defendant privately operated the same, and engaged as a common carrier in general transportation, and during said time connected with the Northern Pacific Railway Company, a railroad under Federal control.

III.

That during said last-mentioned period the defendant railroad sustained a deficit in private operation of said railroad amounting to the sum of $600,527.35, as defined by Section 204 of the Transportation Act, 1920, and as the word "deficit" was construed by the Interstate Commere Commission as alleged in paragraph 4 of plaintiff's complaint herein.

IV

That following the ruling of the Interstate Commerce Commission of February 9, 1922 (Construction of the Word "Deficit," 66 I. C. C., 765, Finance Docket 1600), as alleged in paragraph 4 of

plaintiff's complaint herein, the defendant employed accountants and attorneys who prepared, filed and presented to the Interstate Commerce Commission its claim under said Act in the sum of $600,527.35, and in that connection spent large sums of money in the preparation, filing and presentation of said claim, to wit, a sum in excess of $30,000.00. [21]

V.

That thereafter, as alleged in the complaint herein, the said claim of the defendant was adjusted and allowed by the plaintiff in the sum of $487,116.31, which amount was on or about March 24, 1925, paid to said defendant.

VI.

That thereafter, and on or about the 25th day of March, 1925, the defendant, through its regularly constituted directors and officers, authorized and paid out of said sum to its stockholders as a dividend the sum of $375,000.00, which said sum has been paid to and retained by its stockholders, and has now been lost to the defendant company, and that the remainder of said sum of $487,116.31 has been expended by the defendant company in the payment of taxes, operating expenses, maintenance, repairs and other legitimate expenses of the defendant company.

VII.

That the defendant company's railroad extends from the City of Butte to the City of Anaconda, Montana, and its main line consists of 25.29 miles of single track railroad; that the actual full value of said

railroad property in its entirety, for purpose of securing a loan or for sale, does not exceed the sum of $4,200,000.00; that the defendant company is now indebted on account of outstanding bonds, issued on or about the 1st day of February, 1914, in the sum of $2,131,000.00, which indebtedness is secured by a mortgage on all of defendant's property, and that its present current liabilities exceed its current assets.

VIII.

That if a judgment should be entered in this action, as prayed for by the plaintiff and against the defendant, the defendant is and would be without funds with which to pay the same, or any part [22] thereof, and the defendant therefore alleges that if judgment should be entered, as prayed for in the complaint, the defendant would be unable to pay its debts from its own means, as they become due, and would therefore be insolvent under the laws of the State of Montana.

IX.

Defendant further alleges that following the receipt of said moneys from the plaintiff, as herein alleged, said amount was returned to the Government of the United States in its Federal income tax return as required by law in March, 1926, covering its income for the year 1925, and was on said return shown as income returned for taxation under said Federal income tax laws.

X.

That during the year 1926, as required by law, the defendant made a return to the State of Mon-

tana of its income for the year 1925 under the Montana corporation license tax law, in which return was included the said sum of $487,116.31, as income taxable under the laws of the State of Montana in the year 1926 based upon its income for the year 1925.

XI.

That the property of the defendant company was assessed by the local assessors and by the State Board of Equalization of the State of Montana in the year 1926, and the years following.

XII.

That the defendant company's railroad extends through and is operated in more than one county in the State of Montana, and was during all of the years herein mentioned as such assessed by the State Board of Equalization, except such local property as under the law was assessed by the county assessors of the several counties in which the same was located. [23]

XIII.

That in the determination of the value of railroads and other public utilities operated in more than one county in the State of Montana, the State Board of Equalization did take into consideration, as one of the principal factors in the determination of the value of railroads, including defendant's railroad, for assessment purposes, its income for at least five years next preceding such assessment.

XIV.

That under the laws of the State of Montana and

the regulations of the State Board of Equalization, the defendant company, in common with all other railroad companies operating inter-county railroads in the State of Montana, was required to and did report to the State Board of Equalization its income for the year 1925, including the said sum of $487,116.31 so paid to the defendant by the plaintiff herein, and that said sum was taken into consideration and was reflected in the assessed value of the railroad property of the defendant company for the year 1926 and the years following, and that by reason of the said increased income of the defendant railroad company in 1925, its assessed valuation was higher that it would have been had not this additional sum been paid to defendant and shown in its earnings for the year 1925.

XV.

That by reason of the foregoing, the defendant has been compelled to and did pay large sums of money, to wit, many thousands of dollars in taxes on account of the receipt of the said sum of $487,116.31 from the plaintiff herein, and that there is no way in which the defendant may now be reimbursed on account thereof.

XVI.

The defendant further alleges that if it should now be compelled [24] to return said moneys to the plaintiff, as prayed for in the said complaint, or otherwise, or at all, that it would suffer irreparable loss by reason of the premises, and therefore alleges that in sound morals and good con-

science the plaintiff should not be permitted to recover in this action.

For a third and separate affirmative defense to the complaint of plaintiff herein, the defendant alleges:

I.

That between February 9, 1922, the date on which the Interstate Commerce Commission by a general ruling (Construction of the Word "Deficit," 66 I. C. C. 765, Finance Docket 1600) construed the word "deficit" as used in paragraph (a) of Section 204, Transportation Act, 1920, as alleged in paragraph 4 of the complaint and October 17, 1925, when said Interstate Commerce Commission overruled its general order of February 9, 1922, as alleged in paragraph 10 of the complaint herein, the personnel of the Interstate Commerce Commission had been changed in that Commissioners Potter and Daniels had been succeeded by Commissioners McManamy and Woodlock; that the reversal of the original order and construction of the word "deficit," as in the complaint alleged, was made by a majority and minority vote, the two new commissioners, McManamy and Woodlock joining in the majority vote which brought about a reversal of said general order, and that the said two votes were required to make a majority, and that had they voted the other way the original order would have been continued unchanged, and no action taken against the defendant.

The defendant therefore alleges that by reason of the change of the personnel of the Commission, the

newly appointed and acting Commissioners were without power or jurisdiction to reverse, change or modify the orders made by their predecessors in office. [25]

WHEREFORE, defendant having fully answered, prays that it be dismissed hence, with its costs herein necessarily expended.

L. O. EVANS,
WARREN NICHOLS,
D. M. KELLY, and
JOHN A. GROENEVELD,
Attorneys for Defendant, Butte, Anaconda & Pacific Railway Company.

State of Montana,
County of Silver Bow,—

D. M. Kelly, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant, Butte, Anaconda & Pacific Railway Company, and makes this verification for and on behalf of the said defendant, for the reason that there is no officer of the said defendant, Butte, Anaconda & Pacific Railway Company, within Silver Bow County, Montana, which is the county wherein affiant resides; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

D. M. KELLY.

Subscribed and sworn to before me this 27th day of March, A. D. 1930.

[Notarial Seal] J. A. LIVINGSTON, Jr.,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires Feb. 26th, 1932.

Filed March 28, 1930.

THEREAFTER, on the 18th day of April, 1930, the demurrer of the plaintiff to answer of the defendant was duly filed herein, in the words and figures following, to wit: [26]

(Title of Court and Cause.)

DEMURRER TO ANSWER.

Now comes plaintiff and demurs to the answer of defendant on file herein as follows:

I.

Demurs to the defense set forth on pages 1, 2 and 3 thereof, upon the ground and for the reason that the same does not state facts sufficient to constitute a defense.

II.

Demurs to the "first and separate affirmative defense" set forth on pages 3 to 8, inclusive, of said answer, upon the ground and for the reason that the same does not state facts sufficient to constitute a defense.

III.

Demurs to the "first and separate affirmative de-

fense" set forth on pages 3 to 8, inclusive, of said answer, upon the ground and for the reason that the same is insufficient in law upon the face thereof.

IV.

Demurs to the "second and separate affirmative defense" set forth on pages 8 to 12, inclusive, of said answer, upon the ground and for the reason that the same does not state facts sufficient to constitute a defense.

V.

Demurs to the "second and separate affirmative defense" set forth on pages 8 to 12, inclusive, of said answer, upon the ground and for the reason that the same is insufficient in law upon the face thereof.

VI.

Demurs to the "third and separate affirmative defense" set forth on pages 12 and 13 of said answer, upon the ground and for the [27] reason that the same does not state facts sufficient to constitute a defense.

VII.

Demurs to the "third and separate affirmative defense" set forth on pages 12 and 13 of said answer, upon the ground and for the reason that the same is insufficient in law upon the face thereof.

VIII.

Demurs to the whole of said answer upon the

ground and for the reason that the said answer does not state facts sufficient to constitute a defense.

WELLINGTON D. RANKIN,
United States Attorney.
HOWARD A. JOHNSON,
Assistant United States Attorney.
ARTHUR P. ACHER,
Assistant United States Attorney.

Filed April 18, 1930.

THEREAFTER, on the 31st day of May, 1930, the order of the above-entitled court overruling plaintiff's demurrer to the second defense in defendant's answer and sustaining plaintiff's demurrer to defendant's answer in all else was entered in the minutes of the court, in the words and figures following, to wit:

(Title of Court and Cause.)

ORDER OVERRULING DEMURRER TO ANSWER IN PART AND SUSTAINING IN PART.

This cause heretofore duly heard and submitted to the court came on regularly this day for the decision of the court. Thereupon, after due consideration, court filed its written decision and ordered that plaintiff's demurrer to the answer herein be and is overruled as to the 2d defense and in all else is sustained.

Entered May 31st, 1930. [28]

THEREAFTER, on the 31st day of May, 1930, the decision of the above-entitled court, by written opinion, overruling plaintiff's demurrer to the second defense contained in defendant's answer, and sustaining plaintiff's demurrer to all else in said answer was duly filed herein, in the words and figures following, to wit:

(Title of Court and Court.)

DECISION OVERRULING PLAINTIFF'S DEMURRER TO THE SECOND DEFENSE IN DEFENDANT'S ANSWER AND SUSTAINING PLAINTIFF'S DEMURRER TO ALL ELSE IN SAID ANSWER.

General demurrer to defendant's answer.

The latter admits all vital in the complaint, and includes "affirmative defenses,"—

1st. That the I. C. C. offered to pay part only of what defendant claimed, and solicited defendant's acceptance in settlement, which was given, and that plaintiff "is now estopped from asserting any claim therefor."

2d. That in and about asserting its claim defendant expended much money, has paid income taxes on the amount received on the claim, distributed most of it in dividends, expended the balance on its road; that by return of the money to the United States, defendant would suffer irreparable loss, and the return would be contrary to "sound morals and good conscience."

3d. That the I. C. C.'s change of decision was after change of personnel and without jurisdiction.

In the matter of the 1st defense, defendant cites many cases to the point that accord and compromise of litigated or disputed claims are favored by public policy, and if accomplished, will not be reopened save if tainted by fraud or mistake other than of law; and that the rule applies to Government as to individuals.

Sound enough, but defendant's case does not come within their purview. They relate, as a rule, to legal claims enforceable and settled by Government agents with authority, or like claims affected by mere irregularity of procedure in settlement. [29]

None like this at bar where was nothing but a gratuity to be dispensed, the Government's agent, the I. C. C., having no authority to compromise but only to identify beneficiaries, compute the amount, and certify it to a treasury without authority to do other than pay the certified amount. That the I. C. C. required defendant to execute a "proposed agreement of acceptance" and "in settlement of all claims," goes for nothing save to indicate the dictatorial spirit too often found in our too common "commissions."

The 2d defense counts upon various disbursements by defendant, both in securing the money from the Government and of money itself. In so far as defendant paid money to plaintiff by way of income taxes upon the money by the former received from the latter, it would seem to be entitled

to credit herein. Had it thus paid all, returned all, no reason appears why it would not be a complete defense.

Sec. 774, T. 28, U. S. C. A. seems inapplicable. Even in an accounting case, "independent of any statute provision, the defendant would have a right to show that he had accounted for the value of such advance by delivering the equivalent for which it was made." U. S. vs. Wilkins, 6 Wheat. 145.

In equity and good conscience, defendant liable to plaintiff for the money without authority received, likewise is not liable for so much thereof or equivalent returned. Asking equity, plaintiff must do equity. All else in said defense is insufficient to that end.

Defendant knew the law as well as plaintiff's agents did. Its counsel no doubt was well paid to perpetuate the erroneous construction of it by said agents.

The latter's disharmony was additional notice and warning. [30] Defendant took the chances of the lack of authority in said agents to award and make payment. It knew it was not within the class of beneficiaries by the statute created.

So here, too, the cases and rules it cites, have no application to the circumstances of this its case.

The 3d defense avails nothing. It is true the I. C. C.'s change of opinion subsequent to payment made, affects defendant's status not at all.

The I. C. C.'s pretended rehearing and rejection of defendant's claim were but idle gestures, and added nothing to defendant's liability. That was

complete when defendant received the money, and continued regardless of any I. C. C. fulminations of whatever variety thereafter.

It follows the demurrer is overruled to the 2d defense; in all else, sustained.

May 31, 1930.

BOURQUIN, J.

Filed May 31, 1930.

THEREAFTER, on the 8th day of December, 1930, the amended answer of the defendant to plaintiff's complaint was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

AMENDED ANSWER.

Comes now the defendant, and for answer to the complaint of plaintiff on file herein, admits, denies and alleges:

I.

Admits the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 14 thereof.

II.

Defendant denies generally and specifically each and every [31] allegation, each and every part, and the whole thereof, contained in Paragraphs 9 and 11 of said complaint.

III.

Answering the allegations contained in Para-

graph 10 of said complaint, defendant admits that on or about October 17, 1925, said Interstate Commerce Commission filed its report in Finance Docket 2500, Deficit Status of Bingham & Garfield Railway Company, found in Vol. 99, Interstate Commerce Commission Reports at page 724, wherein it there held and decided that said Section 204 of said Transportation Act, 1920, did not apply to the railroads in said report mentioned.

Except as herein specifically admitted or qualified, defendant denies each and every allegation, and each and every part thereof in said Paragraph 10 contained.

IV.

Answering the allegations contained in Paragraph 12 of said complaint, defendant admits that on or about January 8, 1927, the Interstate Commerce Commission issued an order attempting to reopen the said proceeding, and notified the defendant thereof and to show cause why the certificate of said Commission should not be revoked and the defendant's claim cancelled; and in this connection defendant alleges that it appeared specially at said hearing, and by and through its counsel made a special and limited appearance solely for the purpose of objecting to the jurisdiction of the Commission to make or enter any order reopening the said proceedings, or revoking its order, or in any manner making any further order in connection therewith; that said appearance was a special and limited appearance for said purpose and no other,

and no other appearance was made in said proceeding on behalf of said defendant. [32]

Except as hereinabove specifically admitted or qualified, defendant denies each and every allegation, and each and every part thereof in said paragraph 12 contained.

V.

Answering the allegations contained in Paragraph 13 of said complaint, defendant admits that on or about March 7, 1927, the Interstate Commerce Commission by its order attempted to revoke and cancel the certificate issued by it to the defendant on March 20, 1925, and attempted to dismiss said proceeding, and in this connection defendant alleges that at said time and ever since the month of March, 1925, there was no claim or proceeding pending before the Interstate Commerce Commission on behalf of the defendant herein, and that said claim had been adjusted, settled and paid in March, 1925, and thereafter nothing was pending before said Commission concerning which it could make any order in the premises.

Except as hereinbefore specifically admitted or qualified, defendant denies each and every allegation, and each and every part thereof in said Paragraph 13 contained.

VI.

Defendant denies generally and specifically each and every allegation, each and every part thereof and the whole thereof in said complaint contained, and not hereinbefore specifically admitted or denied.

For a first and separate affirmative defense to

the complaint of plaintiff herein, the defendant alleges:

I.

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, and is and was the owner and operator of a railroad extending from Butte, Montana, to [33] Anaconda, Montana, as alleged in the complaint.

II.

That between January 1, 1918, and September 27, 1918, inclusive, said railroad was operated under Federal control, and for the remainder of the Federal control period, to wit, from September 28, 1918, to February 29, 1920, inclusive, defendant privately operated the same, and engaged as a common carrier in general transportation, and during said time connected with the Northern Pacific Railway Company, a railroad under Federal control.

III.

That during said last-mentioned period the defendant railroad sustained a deficit in private operation of said railroad amounting to the sum of $600,527.35, as defined by Section 204 of the Transportation Act, 1920, and as the word "deficit" was construed by the Interstate Commerce Commission as alleged in Paragraph 4 of plaintiff's complaint herein.

IV.

That following the ruling of the Interstate Commerce Commission, as alleged in said Paragraph 4

of plaintiff's complaint herein, this defendant prepared, made and filed with the Interstate Commerce Commission its claim for the said sum of $600,-527.35, and demanded that said Commission certify to the United States Treasury said amount for payment in accordance with the provisions of the Transportation Act, 1920.

V.

That thereafter, and on or about March 14, 1925, the Interstate Commerce Commission caused to be directed to the defendant, through its Treasurer and Auditor, the following proposition of adjustment of said claim: [34]

"INTERSTATE COMMERCE COMMISSION,
Bureau of Finance,
Washington.

VLA:MM.
Finance Docket No. 2602.
March 14, 1925.

Mr. P. M. Halloran,
Treasurer and Auditor,
Butte, Anaconda & Pacific Railway Co.,
Anaconda, Montana.

Dear sir:

I wish to advise that we have completed our analysis of the claim of the Butte, Anaconda & Pacific Railway Company under section 204 of the Transportation Act, 1920, with the result that we find the amount payable to the carrier for that portion of the period of Federal control during which it operated its property privately, namely, from September 27,

1918, to February 29, 1920, to be $487,116.31, from which there is no amount to be deducted in favor of the Director General as traffic balances or other indebtedness. The amount hereinabove indicated is the amount reported by the Bureau of Accounts as the net credit in favor of the carrier before making the adjustments under the provisions of paragraph (f) of section 209, required by paragraph (b) of section 204. We have not found it necessary to make any adjustments under the above mentioned section.

I am attaching hereto for your signature proposed agreement of acceptance of our ascertainment on the basis hereinabove set forth. If acceptable I shall thank you to execute and file same with the Commission at the earliest date practicable in order that disposition may be made of the case.

Very truly yours,

_____,

Director."

Attachment.

Copy to:

Mr. George H. Parker,
Commerce Counsel,
American Short Line Railroad Association,
1319 F Street, N. W., Washington, D. C."

VI.

That enclosed with the said letter of March 14, 1925, and attached thereto for the signature and approval of the defendant herein was the following agreement of settlement:

"ACCEPTANCE OF ASCERTAINMENT OF THE BUREAU OF FINANCE OF THE INTERSTATE COMMERCE COMMISSION UNDER SECTION 204 OF THE TRANSPORTATION ACT, 1920." [35]

"The Butte, Anaconda & Pacific Railway Company hereby agrees to accept the amount of $487,116.31, ascertained by the Bureau of Finance of the Interstate Commerce Commission as being the amount payable to it under section 204 of the Transportation Act, 1920, for that portion of the period of Federal control during which it operated its property privately in settlement of all claims against the government under said section 204.

BUTTE, ANACONDA & PACIFIC RAILWAY CO.

By ——————————."

VII.

That upon the receipt of said letter of March 14, 1925, and of the agreement and release to be signed by the defendant, the defendant caused said agreement to be signed and executed for it and on its behalf by P. M. Halloran, its Treasurer and Auditor, and filed said agreement of settlement with the Interstate Commerce Commission, which said Commission in recognition thereof, and on March 20, 1925, entered its order as follows:

"FINANCE DOCKET No. 2602.

"DEFICIT SETTLEMENT WITH BUTTE, ANACONDA & PACIFIC RY.

"Submitted January 5, 1925. Decided March 20, 1925.

"The amount payable to the Butte, Anaconda & Pacific Railway Company under the provisions of section 204 of the transportation act, 1920, is ascertained to be $487,116.31, from which no amount is deductible as due to the President, as operator of transportation systems under Federal control, on account of traffic balances or other indebtedness. Certificate issued.

"GEORGE H. PARKER, WARREN NICHOLS, and P. M. HALLORAN for the Carrier.

"REPORT OF THE COMMISSION.

"DIVISION 4, COMMISSIONERS MEYER, AITCHISON AND EASTMAN, BY DIVISION 4:

"The Butte, Anaconda & Pacific Railway Company, a corporation of the State of Montana, hereinafter termed the carrier, is a steam and electric railroad company which, during the Federal control period, engaged as a common carrier in general transportation, operating a [36] line of railroad between Butte and Anaconda, Mont., approximately 25.3 miles in length, which connected with the Northern Pacific Railway, a railroad under Federal control. It is, therefore, a carrier within the meaning

of paragraph (a) of section 204 of the transportation act, 1920.

"The carrier was under Federal control from January 1, 1918, to September 27, 1918, inclusive, and is entitled to the benefits of section 204 for the period from September 28, 1918, to February 29, 1920, inclusive. Its return under our circular of March 4, 1920, indicated a net credit of $600,527.35 in its favor for the period from September 28, 1918, to February 20, 1920, inclusive. Our examination of its accounts shows the net credit to the carrier for that period to be $487,116.31 before making the adjustments under the provisions of paragraph (f) of section 209, required by paragraph (b) of section 204.

"Consideration has been given by us to the adjustment of maintenance charges and applying, so far as practicable, the rule set forth in the proviso of paragraph (a) of section 5 of the standard contract between the director general and carriers under Federal control, we have fixed the maintenance allowance during the period in question at the amount charged by the carrier.

"We find that there is payable to the carrier under paragraphs (f) and (g) of section 204 of the transportation act, 1920, the sum of $487,116.31, from which no amount is deductible as due to the President, as operator of transportation systems under Federal control, on account of traffic balances or other indebtedness. The carrier has expressed its willingness to accept this amount in final settlement of all its claims against the United States under that section.

"Settlement herein is based upon the commission's report of February 9, 1922, in Finance Docket No. 1600, Construction of the Word 'Deficit,' 66 I. C. C., 765. An appropriate certificate will issue.

"Chairman AITCHISON did not participate in the disposition of this case."

VIII.

That the Commission thereupon certified to the Treasurer of the United States that the defendant was entitled to receive the said sum of $487,116.31 from the United States Treasury, and further certified there was nothing due from the defendant to the President as operator of the transportation system under Federal control (on account of traffic balances or other indebtedness) [37] and thereafter the certificate of the Commission was transmitted by the Treasury to the Comptroller of the United States Treasury with the recommendation that a warrant be issued in favor of the defendant for the said last-mentioned sum, payable from the appropriation "Reimbursement to Carriers of Deficit During Federal Control," and that pursuant to said certificate the Treasury issued a warrant in said sum, which was transmitted to the Treasurer of the United States, and by him paid to the defendant in full on or about March 24, 1925, as a result of the aforesaid action, and pursuant to the order and adjustment made thereon, and that the plaintiff is now estopped from asserting any claim therefor.

For a second and separate affirmative defense to the complaint of plaintiff herein, the defendant alleges:

I.

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Montana and is and was the owner and operator of a railroad extending from Butte, Montana, to Anaconda, Montana, as alleged in the complaint.

II.

That between January 1, 1918, and September 27, 1918, inclusive, said railroad was operated under Federal control, and for the remainder of the Federal control period, to wit, from September 28, 1918, to February 29, 1920, inclusive, defendant privately operated the same, and engaged as a common carrier in general transportation, and during said time connected with the Northern Pacific Railway Company, a railroad under Federal control.

III.

That during said last-mentioned period the defendant railroad [38] sustained a deficit in private operation of said railroad amounting to the sum of $600,527.35, as defined by Section 204 of the Transportation Act, 1920, and as the word "deficit" was construed by the Interstate Commerce Commission in paragraph 4 of plaintiff's complaint herein.

IV.

That the following ruling of the Interstate Commerce Commission of Feburary 9, 1922 (Construc-

tion of the Word "Deficit," 66 I. C. C., 765, Finance Docket 1600), as alleged in paragraph 4 of plaintiff's complaint herein, the defendant employed accountants and attorneys who prepared, filed and presented to the Interstate Commerce Commission its claim under said Act in the sum of $600,527.35, and in that connection spent large sums of money in the preparation, filing and presentation of said claim, to wit, a sum in excess of $30,000.00.

V.

That thereafter, as alleged in the complaint herein, the said claim of the defendant was adjusted and allowed by the plaintiff in the sum of $487,116.31, which amount was on or about March 24, 1925, paid to said defendant.

VI.

That thereafter, and on or about the 25th day of March, 1925, the defendant, through its regularly constituted directors and officers, authorized and paid out of said sum to its stockholders as a dividend the sum of $375,000.00, which said sum has been paid to and retained by its stockholders, and has now been lost to the defendant company, and that the remainder of said sum of $487,116.31 has been expended by the defendant company in the payment of taxes, operating expenses, maintenance, repairs and other legitimate expenses of the defendant company. [39]

VII.

That the defendant Company's railroad extends from the City of Butte to the City of Anaconda,

Montana, and its main line consists of 25.29 miles of single track railroad; that the actual full value of said railroad property in its entirety, for purpose of securing a loan or for sale, does not exceed the sum of $4,200,000.00; that the defendant company is now indebted on account of outstanding bonds issued on or about the 1st day of February, 1914, in the sum of $2,131,000.00, which indebtedness is secured by a mortgage on all of defendant's property, and that its present current liabilities exceed its current assets.

VIII.

That if a judgment should be entered in this action, as prayed for by the plaintiff and against the defendant, the defendant is and would be without funds with which to pay the same, or any part thereof, and the defendant therefore alleges that if judgment should be entered, as prayed for in the complaint, the defendant would be unable to pay its debts from its own means, as they become due, and would therefore be insolvent under the laws of the State of Montana.

IX.

That during the year 1926, as required by law, the defendant made a return to the State of Montana, of its income for the year 1925 under the Montana corporation license tax law, in which return was included the said sum of $487,116.31, as income taxable under the laws of the State of Montana in the year 1926 based upon its income for the year 1925.

X.

That the property of the defendant company was assessed by the local assessors and by the State Board of Equalization of the State of Montana in the year 1926, and the years following. [40]

XI.

That the defendant company's railroad extends through and is operated in more than one county in the State of Montana, and was during all of the years herein mentioned as such assessed by the State Board of Equalization, except such local property as under the law was assessed by the county assessors of the several counties in which the same was located.

XII.

That in the determination of the value of railroads and other public utilities operated in more than one county in the State of Montana, the State Board of Equalization did take into consideration, as one of the principal factors in the determination of the value of railroads, including defendant's railroad, for assessment purposes, its income for at least five years next preceding such assessment.

XIII.

That under the laws of the State of Montana and the regulations of the State Board of Equalization, the defendant company, in common with all other railroad companies operating inter-county railroads in the State of Montana, was required to and did report to the State Board of Equalization its in-

come for the year 1925, including the said sum of $487,116.31 so paid to the defendant by the plaintiff herein, and that said sum was taken into consideration and was reflected in the assessed value of the railroad property of the defendant company for the year 1926, and the years following, and that by reason of the said increased income of the defendant railroad company in 1925, its assessed valuation was higher than it would have been had not this additional sum been paid to defendant and shown in [41] its earnings for the year 1925.

XIV.

That by reason of the foregoing, the defendant has been compelled to and did pay large sums of money, to wit, many thousands of dollars in taxes on account of the receipt of the said sum of $487,116.31 from the plaintiff herein, and that there is no way in which the defendant may now be reimbursed on account thereof.

XV.

The defendant further alleges that if it should now be compelled to return said moneys to the plaintiff, as prayed for in the said complaint, or otherwise, or at all, that it would suffer irreparable loss by reason of the premises, and therefore alleges that in sound morals and good conscience the plaintiff should not be permitted to recover in this action.

For a third and separate affirmative defense to the complaint of plaintiff herein, the defendant alleges:

I.

That between February 9, 1922, the date on which the Interstate Commerce Commission by a general ruling (Construction of the Word "Deficit," 66 I. C. C. 765, Finance Docket 1600) construed the word "deficit" as used in Paragraph (a) of section 204, Transportation Act, 1920, as alleged in Paragraph 4 of the complaint, and October 17, 1925, when said Interstate Commerce Commission overruled its general order of February 9, 1922, as alleged in Paragraph 10 of the complaint herein, the personnel of the Interstate Commerce Commission had been changed in that Commissioners Potter and Daniels had been succeeded by Commissioners McManamy and Woodlock; that the reversal of the original order and construction of the word "deficit," as in the complaint alleged, [42] was made by a majority and minority vote, the two new Commissioners, McManamy and Woodlock joining in the majority vote which brought about a reversal of said general order, and that the said two votes were required to make a majority, and that had they voted the other way the original order would have been continued unchanged, and no action taken against the defendant.

The defendant therefore alleges that by reason of the change of the personnel of the Commission, the newly appointed and acting Commissioners were without power or jurisdiction to reverse, change or modify the orders made by their predecessors in office.

WHEREFORE, defendant having fully answered, prays that it be dismissed hence, with its costs herein necessarily expended.

L. O. EVANS,
WARREN NICHOLS,
D. M. KELLY, and
JOHN A. GROENEVELD,
Attorneys for Defendant, Butte, Anaconda & Pacific Railway Company.

State of Montana,
County of Silver Bow,—ss.

D. M. Kelly, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant, Butte, Anaconda & Pacific Railway Company, and makes this verification for and on behalf of the said defendant, for the reason that there is no officer of the said defendant, Butte, Anaconda & Pacific Railway Company, within Silver Bow County, Montana, which is the county wherein affiant resides; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

D. M. KELLY. [43]

Subscribed and sworn to before me this 4th day of December, 1930.

[Notarial Seal] ADOLPH TURK,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires July 11, 1931.

Service of the foregoing answer admitted, and copy received, this 8th day of December, 1930.

WELLINGTON D. RANKIN,
Attorney for Plaintiff, United States of America.

Filed December 8, 1930.

THEREAFTER, on the 26th day of December, 1930, plaintiff's motion for judgment on the pleadings was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

MOTION FOR JUDGMENT ON PLEADINGS.

Comes now the plaintiff in the above-entitled action and moves the court for judgment in favor of said plaintiff and against the defendant herein upon the pleadings on file herein, upon the ground and for the reason that the amended answer of said defendant on file herein, fails to state facts sufficient to constitute a defense to plaintiff's complaint on file herein.

Dated this 24th day of December, 1930.

WELLINGTON D. RANKIN,
United States Attorney,
HOWARD A. JOHNSON,
Assistant U. S. Attorney,
ARTHUR P. ACHER,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

Filed December 26, 1930. [44]

THEREAFTER, on the 27th day of December, 1930, the order of the above-entitled court granting plaintiff's motion for judgment on the pleadings, and ordering judgment entered accordingly was duly entered in the minutes of the court, in the words and figures following, to wit:

(Title of Court and Cause.)

ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS.

This cause was duly called up for hearing on plaintiff's motion for judgment on the pleadings. W. D. Rankin, Esq., U. S. Attorney, appearing for plaintiff, and D. M. Kelly, Esq., being present and appearing for the defendant. Thereupon on the statements of counsel said motion was submitted to the court, and after due consideration, Court ordered that said motion be granted and judgment ordered entered accordingly.

Entered December 27, 1930.

THEREAFTER, on the 2d day of February, 1931, the decision of the above-entitled court, by written opinion, determining the said plaintiff is entitled to interest from demand made at the Montana rate rather than that of the District of Columbia, was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

COURT'S RULING IN RE INTEREST.

The Court is of opinion that plaintiff is entitled to interest from demand made at the Montana rate rather than that of District Columbia.

Those who secure money by mistake are in equity and by statute (Sec. 7887, R. C. Montana) an involuntary trustee, bound to restore on demand and with interest (Sec. 7897 Id.). See also Secs. 7578, 8662, Id., the United States present in all states, the defendant domiciled in Montana, the former obliged to pursue the latter in [45] Montana, like individuals it is entitled to the benefit of the local statutes whatever it might be in the light of other law.

January 31, 1931.

BOURQUIN, J.

Filed February 2, 1931.

THEREAFTER, on the 2d day of February, 1931, the order af the above-entitled court for interest on the Montana rate and that judgment be entered *nunc pro tunc* as of the date the order was made granting plaintiff's motion for judgment on the pleadings was duly entered in the minutes of the court, in the words and figures following, to wit:

(Title of Court and Cause.)

ORDER FOR INTEREST AT MONTANA RATE AND DIRECTING THAT JUDGMENT BE ENTERED NUNC PRO TUNC AS OF THE DATE THE ORDER WAS MADE GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS.

This cause heretofore submitted to the court in the matter of interest came on regularly this day for decision. Thereupon after due consideration the court filed its ruling thereon, wherein the court finds the plaintiff is entitled to interest from demand made at the Montana rate rather than that of the District of Columbia. Thereupon, on motion of Mr. W. D. Rankin, United States Attorney, the court ordered that judgment be entered herein *nunc pro tunc* of the date the order was made granting plaintiff's motion for judgment on the pleadings.

Entered February 2, 1931.

THEREAFTER, on the 3d day of February, 1931, the judgment was duly filed and entered *nunc pro tunc* as of the 27th day of December, 1930, in the words and figures following, to wit:

(Title of Court and Cause.)

JUDGMENT.

This cause came on regularly to be heard on the 27th day of December, 1930, plaintiff being represented by Wellington D. Rankin, [46] United

States Attorney for the District of Montana, and defendant being represented by D. M. Kelly, its counsel herein, and

Upon motion of Wellington D. Rankin for judgment for the plaintiff and against said defendant upon the pleadings on file herein, and the matter having been duly presented and submitted by respective counsel and the court having fully considered the same and being fully advised, granted said motion in behalf of plaintiff for judgment upon the pleadings herein, whereupon the court ordered judgment in favor of the plaintiff as prayed for in its complaint and against the defendant.

WHEREFORE, by virtue of the law and by reason of the premises, IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED that the plaintiff, the United States of America, do have and recover of and from the defendant, Butte, Anaconda & Pacific Railway Company, a corporation, the sum of Four Hundred Eighty-seven Thousand One Hundred Sixteen Dollars and Thirty-one Cents ($487,116.31), with lawful interest thereon at the rate of eight per cent per annum from the 8th day of June, 1928, to the date of entry hereof, together with plaintiff's costs herein incurred, taxed in the sum of $22.00.

Entered this 3d day of February, 1931, *nunc pro tunc* as of December 27, 1930.

C. R. GARLOW,
Clerk, U. S. District Court, District of Montana.
By L. R. Polglase,
Deputy.

Filed February 3, 1931.

THEREAFTER, on the 13th day of March, 1931, the assignment of errors of defendant, petitioner and appellant was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.) [47]

ASSIGNMENT OF ERRORS ON BEHALF OF THE BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, A CORPORATION, THE DEFENDANT, PETITIONER AND APPELLANT.

Comes now the Butte, Anaconda & Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, defendant in the above-entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause from the judgment of the above-entitled court, entered in the above-entitled court and cause on the 3d day of February, 1931, *nunc pro tunc* as of the 27th day of December, 1930:

I.

The Court erred in overruling the demurrer filed by the defendant to the complaint of the plaintiff in the above-entitled cause.

II.

The Court erred in sustaining plaintiff's motion for judgment on the pleadings and ordering judgment in favor of the plaintiff and against the defendant.

III.

The Court erred in allowing the plaintiff, above named, interest from demand on the amount found due to the plaintiff, above named, in the said judgment entered in the above-entitled cause.

IV.

The Court erred in deciding that the plaintiff, above named, was entitled to interest at the Montana rate, to wit, eight per cent (8%), rather than the District of Columbia rate, to wit, six per cent (6%), on the amount found due to the plaintiff, above named, in the said judgment entered in the above-entitled cause.

V.

The Court erred in concluding, deciding and ordering that the [48] plaintiff, above named, is entitled to recover, and that judgment should be entered in favor of the plaintiff, above named.

WHEREFORE, defendant, Butte, Anaconda & Pacific Railway Company, a corporation, prays that the said judgment of the said District Court of the United States for the District of Montana, may be corrected and reversed, and for such other and further relief as to the court may seem just and proper.

Dated this 13th day of March, 1931.

L. O. EVANS,
D. M. KELLY,
WARREN NICHOLS,
JOHN A. GROENEVELD,
Attorneys for Defendant, Butte, Anaconda & Pacific Railway Company, a Corporation.

Service of the within and foregoing assignment of errors on behalf of the Butte, Anaconda & Pacific Railway Company, a corporation, defendant, petitioner and appellant, acknowledged, and copy thereof received this 13th day of March, 1931.

WELLINGTON D. RANKIN,
U. S. Attorney,
HOWARD A. JOHNSON,
Asst. U. S. Attorney,
Attorneys for Plaintiff, United States of America.

Filed March 13, 1931.

THEREAFTER, on the 13th day of March, 1931, defendant's petition for allowance of appeal was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States, for the District of Montana: [49]

The Butte, Anaconda & Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, your petitioner herein and the defendant in the above-entitled cause, conceiving itself aggrieved by the judgment entered in the above-entitled court and cause on the 3d day of February, 1931, *nunc*

pro tunc as of the 27th day of December, 1930, does hereby appeal from said judgment to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith; and the said defendant and petitioner herein, Butte, Anaconda & Pacific Railway Company, prays that an appeal may be allowed to it from the District Court of the United States for the District of Montana to the said United States Circuit Court of Appeals, for the Ninth Circuit, and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit; and the said defendant, Butte, Anaconda & Pacific Railway Company, your petitioner herein, further prays that a proper order fixing the amount of security which the said defendant, Butte, Anaconda & Pacific Railway Company shall give and furnish upon such appeal be made.

Dated March 13th, 1931.

L. O. EVANS,
D. M. KELLY,
WARREN NICHOLS,
JOHN A. GROENEVELD,
Attorneys for Defendant, Butte, Anaconda & Pacific Railway Company, a Corporation.

Service of the within and foregoing petition for allowance of appeal acknowledged, and copy thereof received this 13th day of March, 1931. [50]

WELLINGTON D. RANKIN,
U. S. Attorney.
HOWARD A. JOHNSON,
Asst. U. S. Atty.,
Attorneys for Plaintiff, United States of America.

Filed March 13, 1931.

THEREAFTER, on the 13th day of March, 1931, the order of the court allowing an appeal was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

The petition of the Butte, Anaconda & Pacific Railway Company, a Montana corporation, defendant in the above-entitled cause, for an appeal from the judgment entered in the above-entitled court and cause on the 3d day of February, 1931, *nunc pro tunc* as of the 27th day of December, 1930, is hereby granted, and the appeal is hereby allowed, and the bond on appeal is hereby fixed in the sum of $300.00, a supersedeas bond having been waived by stipulation of counsel filed in the above-entitled cause.

Dated this 13 day of March, 1931.

BOURQUIN,
Judge.

Filed March 13, 1931.

THEREAFTER, on the 13th day of March, 1931, the stipulation of the parties *in re* supersedeas bond was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

STIPULATION IN RE SUPERSEDEAS BOND.

IT IS HEREBY STIPULATED by and between the parties hereto, by [51] and through their respective counsel, that;

WHEREAS the above-entitled action and proceeding involves the litigation in court of questions between the plaintiff herein and other parties than the defendant herein, and

WHEREAS, the above-entitled action and proceeding is a test case, and

WHEREAS, the defendant in the above-entitled action and proceeding is desirous of appealing from the judgment therein, duly given and made, rendered and entered on the 3d day of February, 1931, *nunc pro tunc* as of December 27, 1930, to the United States Circuit Court of Appeals for the Ninth Circuit,—

NOW, THEREFORE, the said defendant in the above-entitled action and proceeding shall not be required to file therein a supersedeas bond, and that the plaintiff in the above-entitled action will not have execution issued on said judgment until the final determination of the appeal in said action and proceeding to the United States Circuit Court of Appeals for the Ninth Circuit, and that execution on said judgment may be stayed until said time.

Dated this 4th day of March, 1931.

WELLINGTON D. RANKIN,
Attorneys for Plaintiff.

L. O. EVANS,
WARREN NICHOLS,
D. M. KELLY,
JOHN A. GROENEVELD,
Attorneys for Defendant.

Filed March 13, 1931.

THEREAFTER, on the 13th day of March, 1931, the bond of the defendant for costs on appeal was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.) [52]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, the Butte, Anaconda & Pacific Railway Company, a Montana corporation, as principal, and

Jas. T. Finlen and Jno. J. Burke, as sureties, are held and firmly bound unto the United States of America in the sum of Three Hundred 00/100 Dollars, the payment of which well and truly to be made, we bind ourselves jointly and severally, and each of our heirs, executors, administrators, successors, and assigns, firmly by these presents, sealed with our seals, and dated this 13th day of March, 1931.

WHEREAS, the principal above named has petitioned for and been allowed by the District Court of the United States for the District of Montana, an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to correct and reverse a judgment rendered and entered in the above-entitled court and cause on the 3d day of February, 1931, *nunc pro tunc* as of the 27th day of December, 1930,—

NOW, THEREFORE, the condition of the above obligation is such that if the said Butte, Anaconda & Pacific Railway Company, defendant, petitioner and appellant herein, shall prosecute its appeal to effect, and answer all costs if it fails to make its plea good then the above obligation to be void; else to remain in full force and virtue.

IN WITNESS WHEREOF, the said Butte, Anaconda & Pacific Railway Company, a corporation, has caused the within instrument to be executed and its corporate seal affixed by its officers thereunto duly authorized, and the said Jas. T. Finlen and

Jno. J. Burke have hereunto set their hands and seals this 13th day of March, 1931.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY.

By J. R. HOBBINS,
Its Vice-president,
Principal. [53]

[Corporate Seal]

Attest: P. M. HALLORAN,
Its Secretary.

JAS. T. FINLEN,
JNO. J. BURKE,
Sureties.

United States of America,
District of Montana,
County of Silver Bow,—ss.

Jas. T. Finlen and Jno. J. Burke, sureties on the within and foregonig bond, being severally duly sworn, on oath, each for himself deposes and says: That he is a resident and freeholder within the State of Montana, and is worth the sum specified in the within and foregoing bond as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

JAS. T. FINLEN.
JNO. J. BURKE.

Subscribed and sworn to before me this 13th day of March, 1931.

[Notarial Seal] JOHN. A. GROENEVELD,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires Nov. 5, 1931.

The within and foregoing bond is hereby approved this 13th day of March, 1931.

BOURQUIN,
Judge.

Filed March 13, 1931.

THEREAFTER, on the 13th day of March, 1931, the citation was duly issued herein, which original citation with admission of service thereon is hereto annexed and is in the words and figures following, to wit: [54]

(Title of Court and Cause.)

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States to the United States of America, Plaintiff and Appellee, and to Wellington D. Rankin, United States District Attorney for the District of Montana, and Arthur P. Acher and Howard A. Johnson, Assistant Attorneys for the United States of America, GREETING:

You, and each of you, are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal filed in the District Court of the United States for the District of

Montana from the District Court of the United States for the District of Montana to the United States Circuit Court of Appeals for the Ninth Circuit, in a suit wherein the Butte, Anaconda & Pacific Railway Company, a corporation, organized and existing under and by virtue of the laws of the State of Montana, is defendant and appellant, and you, the United States of America, are plaintiff and appellee, to show cause, if any there be, why the judgment rendered on the 3d day of February, 1931, *nunc pro tunc* as of December 27, 1930, against said Butte, Anaconda [55] & Pacific Railway Company, a corporation, mentioned in said appeal, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the City of Butte, in the District of Montana, this 13 day of March, 1931.

BOURQUIN,

Judge of the District Court of the United States for the District of Montana. [56]

Service of the within and foregoing citation on appeal acknowledged and a copy thereof received this 13th day of March, 1931.

WELLINGTON D. RANKIN,

United States Attorney for the District of Montana,

HOWARD A. JOHNSON,

Asst. U. S. Attorney,

Attorneys for the United States of America. [57]

Filed March 13, 1931. [58]

THEREAFTER, on the 27th day of March, 1931, the praecipe of the defendant for transcript of record with admission of service thereon was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT OF RECORD TO CLERK OF ABOVE-ENTITLED COURT.

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause, and to incorporate and include in such transcript of record the following, and no other papers or exhibits, to wit:

1. The complaint of the United States of America, plaintiff.

2. The demurrer of the defendant, Butte, Anaconda & Pacific Railway Company, a corporation, to the complaint of the plaintiff.

3. The order of the above-entitled court overruling the demurrer of said defendant to the complaint of said plaintiff dated the 26th day of February, 1930, as entered in the order book of the above-entitled court.

4. The decision of the above-entitled court by written opinion overruling the demurrer of the said defendant to the complaint of the said plaintiff, made and filed on the 26th day of February, 1930.

5. The answer of the said defendant to the complaint of said plaintiff.

6. The demurrer of the said plaintiff to the answer of the said defendant.

7. The order of the above-entitled court overruling the demurrer of said plaintiff to the second defense contained in the answer of said defendant and sustaining the demurrer of said plaintiff to said answer of said defendant in all else, dated the 31st day of May, [59] 1930, as entered in the minutes of the above-entitled court.

8. The decision of the above-entitled court by written opinion overruling the demurrer of said plaintiff to the second defense contained in the answer of said defendant and sustaining the demurrer of said plaintiff to said answer of said defendant in all else, made and filed on the 31st day of May, 1930.

9. The amended answer of the said defendant to the complaint of said plaintiff.

10. The motion for judgment on the pleadings of the said plaintiff.

11. The order of the above-entitled court granting the motion for judgment on the pleadings of the said plaintiff, and ordering judgment entered accordingly, dated the 27th day of December, 1930, as entered in the minutes of the above-entitled court.

12. The decision of the above-entitled court by written opinion determining the said plaintiff is entitled to interest from demand made at the Montana rate rather than that of the District of Columbia made on the 31st day of January, 1931, and filed on the 2d day of February, 1931.

13. The order of the above-entitled court for in-

terest at the Montana rate and that judgment be entered *nunc pro tunc* as of the date the order was made granting plaintiff's motion for judgment on the pleadings dated the 2d day of February, 1931, as entered in the minutes of the above-entitled court.

14. The judgment of the above-entitled court rendered and entered on the 3d day of February, 1931, *nunc pro tunc* as of the 27th day of December, 1930.

15. The assignment of errors of defendant, petitioner and appellant.

16. The petition for allowance of appeal. [60]

17. The order allowing an appeal.

18. The stipulation *in re* supersedeas bond.

19. The bond for costs on appeal.

20. The citation on appeal with admission of service.

21. This praecipe with admission of service thereon.

Said transcript to be prepared and duly certified by you, as required by law, and the rules of the above-entitled court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and that you further state in your certificate, under seal, the cost of said transcript and by whom paid.

Dated this 27th day of March, 1931.

L. O. EVANS,
D. M. KELLY,
WARREN NICHOLS,
JOHN A. GROENEVELD,
Attorneys for Defendant, Petitioner, and Appellant.

Service of the within and foregoing praecipe for transcript of record acknowledged and copy thereof received this 27th day of March, 1931.

WELLINGTON D. RANKIN,
United States Attorney for the District of Montana,
HOWARD A. JOHNSON,
Asst. U. S. Attorney,
Attorneys for the United States of America.

The contents of the transcript of record on appeal as specified in the within and foregoing praecipe is hereby stipulated and agreed to this —— day of March, 1931.

_____,
United States Attorney for the District of Montana,

_____,
Attorneys for the United States of America.

Filed March 27, 1931. [61]

CERTIFICATE OF THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 62 pages, numbered consecutively from one to 62, in-

clusive, is a full, true and correct transcript of the record and proceedings in the within-entitled cause, required to be incorporated in said transcript by praecipe filed, as appears from the original records and files of said court and cause in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of said transcript amount to the sum of Six and 40/100 dollars ($6.40), and that said costs have been paid by the appellant.

WITNESS my hand and seal of the United States District Court for the District of Montana at Butte, Montana, this 6th day of April, 1931.

[Seal] C. R. GARLOW,
Clerk of the United States District Court for the District of Montana.

By L. R. Polglase,
Deputy Clerk. [62]

[Endorsed]: No. 6434. United States Circuit Court of Appeals for the Ninth Circuit. Butte, Anaconda & Pacific Railway Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed April 10, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6434

United States
Circuit Court of Appeals
For the Ninth Circuit

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the District of Montana.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1931 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Monday, the nineteenth day of October in the year of our Lord One Thousand Nine Hundred and Thirty-one.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable WILLIAM P. JAMES, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. D. M. Kelly, counsel for the appellant, and by Mr. Wellington D. Rankin, United States Attorney, counsel for the appellee, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Monday, the seventh day of November in the year of our Lord One Thousand Nine Hundred and Thirty-two.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the District of Montana.

Before: WILBUR and SAWTELLE, Circuit Judges, and JAMES, District Judge.

JAMES, District Judge:

Appellant is the owner of a railroad which extends from Butte to Anaconda, in the State of Montana, connecting at Butte with the Northern Pacific Railway. It was operated, under control of the Federal Government, from January 1, 1918, to September 27, 1918, on which last mentioned date it was released from control. Thereafter, and from September 28, 1918, to February 29, 1920, it operated under its own management. During the latter period its operating income was $2,079,693.08. Its operating expenses were $1,840,167.95, leaving

a net income of $239,525.13. It claimed from the Government that it was entitled under provisions of the Transportation Act of 1920 to reimbursement for decreased income in the amount of $600,527.35 as for the stated period after it was released from control. The Interstate Commerce Commission, acting on the application of appellant, made its certificate that the railroad company had sustained a deficit in the sum of $487,116.21, which sum in March, 1925, was paid to appellant from the Treasury of the United States. On March 7, 1927, the Commission made its order cancelling the certificate upon which payment of the "deficit" amount had been paid. In August, 1929, the United States brought this suit to recover the amount so paid to appellant for the alleged reason that payment was unauthorized by the law. The defendant answered the complaint and the District Court, upon motion, awarded judgment on the pleadings in favor of the Government. This appeal was then taken.

Appellant, in its answer made to plaintiff's complaint, admitted that it realized a profit through its own management from the operation of its railroad prior to the termination of Federal control, and for the period before stated. It denied that the payment of the money sued for was improperly or illegally made; denied the right of the United States to sue for the recovery of the money; alleged that as it had disbursed the sum in the payment of dividends, expenses of maintenance and operation,

taxes, etc., and had been charged with taxes on the money as being properly possessed by it, the United States was estopped to require repayment.

The Transportation Act, approved February 28, 1920 (41 Stats. page 456), which amended the Interstate Commerce Act, provided (Sec. 204) that the Federal control of the railroads should terminate on March 1, 1920. It contained many provisions for the adjustment of matters growing out of Government administration of the railroads. It determined, among other things (Sec. 204, codified, 49 U. S. C. A. 73) that reimbursement should be made to relinquished roads for "deficits" suffered by the latter in "railway operating income" during the time when the Government control was operative. This for the apparent reason that short lines not operating under the arrangement whereby "just compensation" was rendered to controlled roads, might by reason of the competition of the controlled roads (the latter being subject to Government orders regarding routing and diversion of traffic and wage scales) be unfairly discriminated against. In that connection Section 204, the provisions of which prescribe a complete method for reimbursement of the relinquished lines, declares, first, (a) that the term "carrier" as used in the section means "a carrier by railroad which, during any part of the period of Federal control engaged as a common carrier in general transportation, and competing for traffic, or connected with a railroad under Federal control, and which sustained a deficit

in its railway operating income for that period (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation: * * *." Also, that the "test" period with which the income should be compared, was the three years ending June 30, 1917.

Subdivision (b) refers to computation methods to be used in the accounting. 1st, railway operating income or deficit *for the period of Federal control* is required to be arrived at by a method "similar" to that specified in Section 209 (40 U. S. C. A. 77). The latter section contains provisions covering the guarantee period for six months from and after March 1, 1920, application of which is not involved here except for the purposes indicated above. 2nd, that the method for computing railroad operating income or deficit *for the test period* shall be that described in Section 1 of the Control Act (40 Stats. 451). These references in subdivision (b) furnish the guide as to the proper items to be considered in casting totals in operating income or deficit during the respective periods. Particular calculations are then to be made in respect of arriving at the credit to be given the carrier on account of deficit in operating income suffered during the control period. The remaining provisions of Section 204 are now quoted in full.

"(c) *Ascertainment of amounts of railway operating income and deficits therein; test period return.* As soon as practicable the commission shall ascertain for every carrier, for

every month of the period of Federal control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if any (hereinafter called 'Federal control return'), and the average of its deficit in railway operating income, if any, and of its railway operating income, if any, for the three corresponding months of the test period taken together (hereinafter called 'test period return'): *Provided,* That 'test period return,' in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during the test period taken together, during which the carrier operated its railroad or system of transportation.

(d) *Sums to be credited to carrier.* For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, or (2) the difference between its test period return, if an income, and its Federal control return, if a smaller income,

or (3) the sum of its Federal control return, if a deficit, plus its test period return, if an income. The sum of such amounts shall be credited to the carrier.

(e) *Sums to be credited to United States.* For every such month the commission shall then ascertain (1) the difference between the carrier's Federal control return, if an income, and its test period return, if a smaller income, or (2) the difference between its test period return, if a deficit, and its Federal control return, if a smaller deficit, or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit. The sum of such amounts shall be credited to the United States.

(f) *Payments of difference to carrier.* If the sum of the amounts so credited to the carrier under subdivision (d) of this section exceeds the sum of the amounts so credited to the United States under subdivision (e) of this section, the difference shall be payable to the carrier. In the case of a carrier which operated its railroad or system of transportation for less than a year during, or for none of, the test period, the foregoing computations shall not be used, but there shall be payable to such carrier its deficit in railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation.

(g) *Certification of amounts payable to carriers; warrants and payment thereof.* The commission shall promptly certify to the Secretary of the Treasury the several amounts payable to carriers under paragraph (f). The Secretary of the Treasury is authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto."

Shortly after this act became effective, claims were made by certain released short line roads for reimbursement under the provisions of the section. The Interstate Commerce Commission on the earlier applications determined that reimbursement should be made wherever it is shown that the relinquished lines had suffered a decrease in income during the Federal control period, as compared with the test period. In other words, that whether the carrier had operated at a loss during the control period was not a determining factor. Claims were allowed and paid under that construction, although several of the commissioners dissented. (66 I. C. C. 765.) Later, claims for many millions of dollars were filed with the Commission to recover for decreased income, and, upon a reconsideration of the question, the Commission reversed its former holding and declared that in order to have the benefits of Section 204 of the Transportation Act the carrier concerned was required to show that it had operated at a loss during the control period. (99 I. C. C. 724.)

It seems to be admitted that the terms of subdivision (a) of Section 204, taken alone, entitles a carrier to compensation only when it operated at a loss during the control period. It is argued, however, that this construction is affected by the provisions of subdivisions (c), (d), (e) and (f) which prescribe the method by which the deficit is to be ascertained. This argument is without force when it is considered that subdivision (a) explicitly defines the carrier as to whose income the subsequent provisions are to be applied; the latter provisions are necessarily subordinate to the class definition contained in subdivision (a). It is true enough that under the method prescribed in (c), (d), (e) and (f) a railroad which had not operated at a loss but had had a continuous (month by month) net profit during Federal control, against a greater test period profit, would be shown to have a credit in its favor, which, by subdivision (f) would be payable to the carrier; for the reason that provisions (d) and (e) referring to comparative monthly computations that are to be made, include calculations as to "the difference between its test period return, if an income, and its Federal control return, if a smaller income." But as one of the commissioners well stated in his dissenting opinion in the earlier decision of the Commission, "This method of monthly calculation was undoubtedly devised for the reason that there was a seasonable variation in traffic and a fair result would be obtained by comparing operating income by separate months with

corresponding income during the test period." The construction to be given to the section as a whole seems not to be doubtful. The carrier, under subdivision (a), first determines whether it has suffered a loss in its operating income as a whole, for the period of Federal control and while it was not under Federal control. If it has suffered such a loss, then the amount of its reimbursement is to be worked out by means of the calculations required to be made under (c), (d), (e) and (f). If it has not suffered such a loss, it has no right to reimbursement. This construction appears to be in harmony with the purpose of Congress. If the construction that a diminution in income compared with the test period is the criterion, then a discrimination would be worked against carriers of the same class which operated for less than a year during the test period; as to which, by subdivision (f), it is provided that the computations described in subdivision (d) and (e) shall not be applied, but that there shall be payable to such carriers "deficit in railway operating income (as a whole) for the period of Federal control during which it operated its own railroad or system of transportation." There is no reason or consistency in construing the reimbursement provision as to the latter roads to limit the right to payment to actual deficit during Federal control, and allow other short lines which operated a year or more during the test period to full reimbursement for depreciation in income regardless of whether any loss or "deficit" was suf-

fered. The argument that a short line having a deficit in operating income under its own operation during Federal control is given unfair advantage over roads not suffering such deficit but producing but a small income, is beside the question, for the right of Congress to define the class of carrier entitled to benefits cannot be disputed. There is no real contention made that where the term "deficit" is used in the subdivisions which prescribe methods of computation, including those contained in the guaranty provisions of Section 209 of the Act (49 U. S. C. A. 77), "deficit" means anything other than an excess of outlay over receipts.

The appellant contends that even though the Commission misconstrued the Act in allowing to the railroad the sum of money which the government seeks to recover, that its act is not subject to review by the Courts as the Commission had jurisdiction to determine the matter finally; that it acted judicially and that its first order must stand. This argument would be difficult to answer were the case one where the railroad had presented itself showing a deficit in its operating returns as compared with the test period and the dispute was as to the particular sum due to it. But, under the admitted facts, its case was not one which the Commission was authorized to consider at all. It has been clearly settled that the Courts have full right when appealed to, to determine by independent hearing, whether agencies of the government to which have been committed duties involving the exercise of

administrative functions, or powers of a judicial nature, have exercised their powers with respect to the particular persons or subject matter designated by Congress. If the power is lacking the act is void. This subject in general was discussed at length in the recent decisions of the Supreme Court: Crowell v. Benson, 288 U. S. 22. See also: Interstate Commerce Commission v. Ill. Cent. R. R., 215 U. S. 452; Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433; Interstate Commerce Commission v. Union Pac. R. R., 222 U. S. 541; Tagg Bros. & Moorehead v. United States, 280 U. S. 420 at page 442. The added contention of appellant that the settlement made was one of compromise does not make a different case because the railroad company was not entitled to any amount under the facts as admitted.

The United States may demand repayment of money paid out by its officers or agents where no authority of law exists for such payment. Persons so receiving public funds are charged with knowledge that they have taken that to which they have not the right, and are bound, upon demand, to return it. Decisions determining the question differently where private parties are wholly concerned, are not pertinent. No estoppel as for voluntary payment can be claimed to defeat the suit of the government: Wisconsin Central Ry. v. United States, 164 U. S. 190. Cited with approval in Allen v. United States, 204 U. S. 581 and Grand Trunk v. Western Ry. Co., 252 U. S. 112, Sutton v. United

States, 252 U. S. 576. No conditions are present like those where a person has contracted with a government agency and received payment in return for a consideration actually rendered by him (as the performance of work) and it has later been discovered that the contract was not legally authorized. Here the railroad company returned nothing to the government in exchange for the money received. Plaintiff had only to show that the money was improperly paid as described. What use appellant thereafter made of it is immaterial. No estoppel can be claimed because it disbursed the fund and was taxed because of the possession and claimed ownership of it. The decisions cited affirming the right of the United States to recover public money so paid out without authority of law, as a corollary must imply that there is no estoppel under conditions such as this case presents.

Appellant makes the further complaint that the action of the Court in adjudging that plaintiff was entitled to interest on the principal sum claimed, at the legal rate fixed by the law of the State of Montana where the suit was tried, and from the date of the demand made for repayment, was improper. It is a rule long established that where a person refuses to return money due to another, a judgment thereafter obtained for the recovery thereof will include interest from the date of the demand. Interest is generally allowable for "delay in discharging a duty, * * * And in default on a contract to pay money even without express legis-

lation so directing * * * the rate must be reasonable and conform to the custom which obtains in the community." Billings v. United States, 232 U. S. 261, which cites and quotes from Young v. Godbe, 15 Wall. 562. "Both in law and in equity interest is alowed on money due." Miller v. Robertson, 266 U. S. 243 at 258. See also: Oklahoma State Bank v. Galion Iron Works & Mfg. Co., 4 Fed. (2nd) 337, C. C. A. 8; Kishi v. Humble Oil & Ref. Co., 10 Fed. (2nd) 356, C. C. A. 5. Where interest is allowed it is at the legal rate fixed by the law of the forum. Mather v. Stakely, 217 Fed. 764, C. C. A. 1. In the case last cited the suit, tried in the Massachusetts district, was brought on covenants on a warranty deed on lands in Florida. The District Court allowed interest at eight per cent per annum, being the legal rate in Florida, whereas the rate fixed in Massachusetts was six per cent. The Circuit Court of Appeals held that the District Court erred and that the Massachusetts rate governed. See also: The Leonie O. Louise, 4 Fed. (2nd) 699, C. C. A. 5. Decisions of District Judges to the same effect in cases in which the United States was the plaintiff, are: United States v. Pan-American Petroleum Company, 24 Fed. (2nd) 206; United States v. Skinner & Eddy, 28 Fed. (2nd) 373; Jones Company v. Canadian Ry. Co., 14 Fed. (2nd) 852.

No error is found entitling appellant to a reversal of the judgment.

Affirmed.

[Endorsed]: Opinion. Filed November 7, 1932. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6434

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT.

UPON APPEAL from the District Court of the United States for the District of Montana.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Montana, and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[Endorsed]: Judgment. Filed and entered November 7, 1932. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the sixteenth day of January in the year of our Lord One Thousand Nine Hundred and Thirty-three.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANK F. NORCROSS, District Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant, filed December 6, 1932, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

APPLICATION FOR STAY OF MANDATE.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now Butte, Anaconda & Pacific Railway Company, a corporation, appellant above named, and shows and makes known to the Court:

That the decision and opinion in the above entitled cause was rendered and filed herein November 7, 1932, and

That on December 6, 1932, appellant has filed herein its petition for a rehearing in said cause and that in the event of a denial of the petition for rehearing, appellant desires to remove the cause to the Supreme Court of the United States on an application for writ of certiorari, and

That in the event of a denial of the petition for rehearing, appellant will file its petition for such writ of certiorari with the Clerk of the Supreme Court of the United States.

Appellant therefore respectfully petitions this Court that in the event of a denial of its petition for rehearing that a stay of the issuance of the mandate of this Court be ordered for a period of sixty (60) days from such date in order that appellant may have sufficient time within which to prepare the record and its petition for a writ of certiorari and file the same with the Clerk of the Supreme Court of the United States.

In the event that such stay be granted, appellant will file its application for said writ and will request the Clerk of the Supreme Court of the United States to advise the Clerk of this Court of the filing of said petition for writ of certiorari so

that the mandate of this Court may be stayed pending the termination of said petition.

Respectfuly submitted,

D. M. KELLY,
WARREN NICHOLS,
JOHN A. GROENEVELD,
Attorneys for Appellant.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. D. M. Kelly, counsel for the appellant, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including March 18, 1933; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated, San Francisco, California,
January 16, 1933.

[Endorsed]: Filed January 16, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-eight (98) pages, numbered from and including 1 to and including 98, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 26th day of January, A. D. 1933.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 17, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3304)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No._____

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

May It Please the Court:

The petition of the Butte, Anaconda & Pacific Railway Company, a corporation, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioner is a shortline carrier whose road was in the possession and control of the United States and operated by the Director General of Railroads from January 1st, 1918, to September 27th, 1918, when it was relinquished, and thereafter, throughout the remainder of the period of Federal control, it was operated by the petitioner.

In a proceeding before the Interstate Commerce Commission, under the provisions of Sections 204 and 212 of the Transportation Act of 1920, entitled Reimbursement of Deficits During Federal Control (Appendix hereto, page 47),

petitioner filed its return with the Commission showing a net credit of $600,52[illegible]

Thereafter, the Commission determined the amount due petitioner to be $487,116.31, and that amount was offered to the petitioner on condition that it sign a release accepting said amount "in settlement of all claims against the government under said Section 204." (R. 44-46). See *Deficit Settlement with Butte, Anaconda & Pacific Railway,* 94 I.C.C. 617; decided March 20th, 1925, (R. 47-49). This amount was certified to the Treasurer of the United States and paid in full to petitioner on March 26th, 1925. The Commission made this award and settlement in accordance with its interpretation of Section 204 in *Construction of the Word "Deficit,"* 66 I.C.C. 765, decided February 9th, 1922. The Commission later reconsidered its said interpretation of Section 204 in the case of *Deficit Status of Bingham & Garfield Railway Co.,* 99 I.C.C. 724, decided October 17th, 1925, and thereafter attempted to reverse its decision and award and rescind its settlement with petitioner. (*Deficit Settlement with Butte, Anaconda & Pacific Railway,* 117 I.C.C. 780, decided March 7th, 1927.)

On August 23rd, 1929, the Government commenced this proceeding, by complaint as for money had and received, to recover said sum of $487,116.31, together with lawful interest from demand, and costs, (R. 2), alleging in substance the various proceedings had as above outlined. The gist of the action is that the construction placed by the Commission upon the word "deficit" (66 I.C.C. 765, supra) was an erroneous and unwarranted construction. (R. 5). Demurrer was filed to said complaint (R. 8), which was overruled by the District Court (R. 9), (38 Fed. (2d) 871), after which answer (R. 17), demurrer thereto (R. 34), overruled in part and sustained in part by the District Court (R. 37), and amended answer (containing affirmative defenses, first, compromise and settlement hereinbefore mentioned, second, cer-

tain equities in favor of the petitioner, and third, change in personnel of the Commission between the dates of its interpretations of Section 204 hereinbefore mentioned) (R. 40), were filed. Motion for judgment on the pleadings by the Government (R. 57) was granted by the District Court (R. 58), and judgment entered thereon (R. 60). Thereafter an appeal was allowed to the Circuit Court of Appeals for the Ninth Circuit (R. 66), and, on appeal, the judgment of the District Court was affirmed (R. 95). (Opinion R. 82-94, 61 Fed. (2d) 587.)

The pleadings show that the petitioner, after having been relinquished by the Director General, sustained a deficit in railway operating income in its own operations during the Federal control period as compared with its test period operations, but that its railway operating income exceeded its railway operating expenses during the Federal control period. The pleadings raise the questions presented herein.

B.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the Ninth Circuit has herein decided an important question of Federal law which has not been, and should be, settled by this Court. The construction, interpretation and application of Sections 204 and 212 of the Transportation Act of 1920 are involved.

The Circuit Court of Appeals determined that the petitioner did not come within the terms of Section 204, subdivision (a), defining carriers, standing alone, or construed in connection with the other subdivisions of Section 204, because it did not, on the face of the pleadings, sustain a loss in its railway operating income during the Federal control period, although it suffered a decrease of $487,116.31 therein, as compared to the test period. There were seventy-two other shortline railroads similarly taken over by the Government

under the President's proclamation in accordance with the provisions of the Federal Control Act (Act of March 21, 1918; C. 25, 40 Stat. 451), and which were almost immediately released from Federal control, and continued to operate under the same conditions and with the same results as petitioner, which would be, and are, directly affected by any final determination of this proceeding.

A final decision by this Court will avoid a multiplicity of suits in the several circuits of the country because this case is admittedly a test case in that it is understood that the Government will not commence actions against other railroads similarly situated until this action shall be determined finally. The questions involved should be settled finally by this Court.

2. The decision of the Circuit Court of Appeals herein, holding that Section 204, Subdivision (a), covered only so-called "red ink" railroads, thus eliminating those shortline railroads which sustained a decrease in income and whose operations were less favorable during the period of Federal control than during the test period, but did not result in a "red ink" figure, is in conflict with the applicable decision of this Court in the case of *Continental Tie and Lumber Co. v. United States*, 286 U.S. 290, and the decision of the Court of Appeals of the District of Columbia in the case of *United States ex rel. Cripple Creek & Colorado Springs Railroad Co. v. Interstate Commerce Commission*, 11 Fed. (2d) 554, (*certiorari* denied, 273 U. S. 706).

3. The decision of the Circuit Court of Appeals herein, holding that the court has authority to review the determination of the Interstate Commerce Commission in its construction of Section 204, is in conflict with applicable decisions of this Court under the *Dent Act* (40 Stat. 1272) in the cases of *Work v. Rives*, 267 U.S. 175, *Wilbur, Secretary, v. United States ex rel. Vindicator Gold Mining Co.* 284 U.S. 231, and *Wilbur, Secretary, v. United States ex rel. Chestatee P. & C.*

Corporation, 53 Sup. Ct., 293, decided Jan. 16, 1933, and, in this connection, the decision of the Circuit Court of Appeals herein, holding that the deterimnation of the Interstate Commerce Commission was not final, despite the fact that it was the intention of Congress to make the certificate issued under Sections 204 and 212 final, is in conflict with applicable decisions of this Court in the cases of *Great Northern Ry Co. v. United States,* 277 U. S. 172, and *United States v. Great Northern Ry Co.,* decided November 7th, 1932, 53 S. Ct. 28.

4. The decision of the Circuit Court of Appeals herein, holding that the Interstate Commerce Commission did not have the power and authority both to construe the law and determine the facts under Sections 204 and 212, is in conflict with applicable decisions of this Court in the cases of *Great Northern Ry. Co. v. United States,* 277 U. S. 172, and *United States v. Great Northern Ry. Co.,* 53 Sup. Ct. 28, and the decision of the Court of Claims in the case of *Wyandotte Terminal R. R. Co. v. United States,* 64 Court of Claims 328, *(certiorari* denied, 276 U. S. 630), and the decisions of the Court of Appeals of the District of Columbia in the cases of *United States ex rel. C.C. etc. Ry. v. Interstate Commerce Commission,* 11 Fed. (2d) 554, *(certiorari* denied, 273 U.S. 706), and *United States ex rel. Abilene etc. Ry. Co. v. Interstate Commerce Commission,* 8 Fed. (2d) 901, *(certiorari* denied, 270 U.S. 650).

5. The decision of the Circuit Court of Appeals herein, determining that the reimbursement to shortline railroads under Section 204 was, in effect, a mere subsidy, and that when the petitioner received its reimbursement it had given the Government nothing in exchange therefor, and that the usual equitable principles applying in cases of suit for the recovery of money had and received should not apply, when the Government is the suitor, is in conflict with the decision of this Court in the case of *Continental Tie and Lumber Co. v. United States,* 286 U.S. 290, and the applicable decisions

of this Court in the cases of *McKnight v. United States*, 98 U.S. 179, and *United States v. Hill*, 120 U.S. 169.

6. The decision of the Circuit Court of Appeals herein, holding that there was no power in the Commission to compromise and settle the controversy herein between petitioner and the United States, despite the acceptance by petitioner of less than the amount claimed, in full settlement, discharge and release of petitioner's claim for reimbursement under Section 204, is in conflict with the applicable decision of the Court of Claims in the case of *Standard Steel Car Co. v. United States*, 60 Court of Claims, 726, and the applicable decision of the Circuit Court of Appeals, Third Circuit, in the case of *D'Olier Engineering Co. v. United States*, 244 Fed. 90.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6434, Butte, Anaconda & Pacific Railway Company, a corporation, Appellant, vs. United States of America, Appellee, and that the said judgment of the Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray.

BUTTE, ANACONDA & PACIFIC
RAILWAY COMPANY,
By D. M. KELLY,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. _____

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(Index precedes petition.)

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion in the Circuit Court of Appeals for the Ninth Circuit, rendered on November 7th, 1932, is reported at 61 Federal (2d) page 587, and is printed in the record at pages 82 to 94, inclusive.

The opinion of the District Court for the District of Montana, overruling demurrer to complaint, rendered on February 26th, 1930, is reported at 38 Federal (2d) page 871, and is printed in the record at pages 10 to 17, inclusive.

The opinion of the District Court for the District of Montana, on demurrer to answer, rendered on May 31st, 1930, is printed in the record at pages 37 to 40, inclusive.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as

amended by the Act of February 13th, 1925, (C. 229, Sec. 1, 43 Stat., 938, 28 U.S.C.A., Section 347 (a).)

2. The date of the judgment to be reviewed is November 7th, 1932 (R. 95). Petition for rehearing was filed with the Clerk of the Circuit Court of Appeals for the Ninth Circuit on December 6th, 1932, and within thirty (30) days after the judgment was rendered, as provided by Rule 29 of the Rules of the Circuit Court of Appeals for the Ninth Circuit, and the petition for rehearing was denied on January 16th, 1933 (R. 96).

III.

STATEMENT OF THE CASE.

The statement of the case under part "A" of the foregoing petition is hereby referred to and, in the interest of brevity, is not repeated here.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in affirming the order of the District Court overruling petitioner's demurrer to the complaint of the United States of America.

2. The Circuit Court of Appeals erred in affirming the order of the District Court sustaining the motion of the United States of America for judgment on the pleadings and ordering judgment in favor of the United States of America, and against the petitioner.

3. The Circuit Court of Appeals erred in finding and holding that there was no error in the judgment of the District Court entitling petitioner to a reversal, and in affirming said judgment.

V.

FEDERAL STATUTE INVOLVED.

An important question of Federal Law was decided by the Circuit Court of Appeals involving the construction of Sec-

tions 204 (Feb. 28, 1920, C. 91, Sec. 204, 41 Stat. 460, 49 U.S.C.A. Sec. 73.) and 212 (Feb. 28, 1921, C. 72, 41 Stat, 1145, 49 U.S.C.A. Sec. 79.) of the Transportation Act of 1920, set out in the appendix hereto on pages 47 to 50.

VI.

QUESTIONS INVOLVED.

A question of Federal law is involved which this Court should decide in view of the fact that the instant case is a test case. It is submitted that the decision of the Circuit Court of Appeals herein is inconsistent with the decisions of this Court, and other courts, as hereinafter discussed. There is also considerable confusion as to the construction and finality of Sections 204 and 212 which should be resolved by this Court.

That the construction given to Section 204 by the Circuit Court of Appeals herein is inconsistent with decisions of this and other courts which show that the construction of Section 204 by the Interstate Commerce Commission by virtue of which petitioner was reimbursed was, and is, correct, both as carrying out the intention of the Congress and as a liberal interpretation of the Transportation Act, declared to be remedial by this Court.

Contrary to the decision of the Circuit Court of Appeals herein, Sections 204 and 212, assuming, but not conceding, an erroneous construction thereof which included petitioner, vest the Interstate Commerce Commission with sole, exclusive and nonrecurrent power and discretion to determine the right of the petitioner (and other railroads similarly situated), to reimbursement thereunder, which required on the part of the Commission an interpretation of the law and a determination of the facts. The exercise of this jurisdiction was not an exertion of the power delegated to the Interstate Commerce Commission as such. These principles are in accord with applicable decisions of this and other courts.

Contrary to the decision of the Circuit Court of Appeals herein, the determination of the Interstate Commerce Commission under Sections 204 and 212 in including petitioner within the terms thereof, assuming, but not conceding, the same to be erroneous, was and is final and conclusive, binding alike upon the United States, the petitioner, the Commission and the courts, under decisions of this and other courts, so that the decision of the Commission cannot be reopened, reviewed, reversed or set aside by this or any other proceeding.

That the reimbursement paid to petitioner in accordance with Section 204 was not a payment for which the Government has received nothing in exchange, as stated by the Circuit Court of Appeals, but was a reimbursement for decrease in income sustained by it by reason of Government operation of railroads during the War period, being taxable income, as decided by this Court.

That the payment of the money under Section 204 was the result of a compromise and settlement, and therefore cannot be recoverd back by the Government, under the decisions of this and other courts, and the money so paid *ex aequo et bono* belongs to petitioner, as reimbursement and is not a subsidy for which the Government received nothing in return, as held by the Circuit Court of Appeals herein, contrary to applicable decisions of this and other courts.

VII.

ARGUMENT.

Since this case was decided on the pleadings, the specification of errors is necessarily general in raising questions which are stated as the reasons for the allowance of the writ, set forth in the foregoing petition, and, these questions will be argued in the order in which stated as reasons for the allowance of the writ.

1. THE CIRCUIT COURT OF APPEALS HEREIN

HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN AND SHOULD BE SETTLED BY THIS COURT.

Petitioner in the argument to follow has attempted to place before this Court the present situation shown by the decisions of this Court and the various other Federal Courts in determining the scope and effect of Sections 204 and 212 of the Transportation Act of 1920. It is respectfully submitted that the decisions show that the question has not yet been definitely decided by this Court.

There are numerous shortline railroads interested in a proper construction and interpretation of these sections, and in retaining the money paid them in accordance with the construction and interpretation of the Act by the Interstate Commerce Commission. The Commission, between February 9th, 1922, the date on which it decided *Construction of the word "deficit,"* 66 I.C.C. 765, supra, and October 17th, 1925, the date on which it decided *Deficit Status of Bingham & Garfield Ry. Co.*, 99 I.C.C., 724, supra, awarded to seventy-two shortline carriers approximately $2,800,000.00, and issued certificates to the Treasurer thereon, which were paid. These carriers were all of the same class as petitioner in that they had sustained a decrease in railway operating income in the Federal control period as compared to the test period, but they did not sustain a loss in railway operating income during the Federal control period.

Since this case is a test case, brought by the Government to determine its right to recover back not only the payments made to petitioner but to all railroads similarly situated, a final decision by this Court would not only determine the rights of the petitioner but of many or all of the seventy-two railroads above menioned, and thereby avoid a multiplicity of suits. These many railroads are scattered throughout the country, and diversity of opinion will no doubt arise in the several circuits of the country on the questions involved,

and this Court would finally be called upon to decide the questions.

Unless petitioner is given the right of review at this time, its rights will be forever foreclosed, even though this Court should at a later date decide that petitioner's position is correct.

2. THE DECISION OF THE CIRCUIT COURT OF APPEALS, HOLDING THAT SECTION 204, SUBDIVISION (a), OF THE TRANSPORTATION ACT OF 1920, DOES NOT INCLUDE PETITIONER WITHIN ITS TERMS, IS IN CONFLICT WITH CONTINENTAL TIE AND LUMBER CO. vs. UNITED STATES, 286 U.S. 290, AND UNITED STATES EX REL. C. C. ETC. RY CO. v. INTERSTATE COMMERCE COMMISSION, 11 FED. (2d) 554, (*CERTIORARI* DENIED, 273 U.S. 706), IN CONSTRUING THE SAME PROVISION.

The position was taken by petitioner in the District Court, and again in the Circuit Court of Appeals, that petitioner was one of the railroads entitled to be reimbursed under Section 204.

In addition to the other requirements of subdivision (a) of Section 204, all of which are conceded, it "sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation."

Petitioner's position was that this phrase, whether standing alone or construed in connection with the balance of Section 204, meant a decrease or falling-off in railway operating income, and not necessarily a "red ink" figure; first, by giving effect to the correct definition of the word "deficit" itself; second, to accord with the intent of the Congress as shown by the Congressional Record and by comparison with other statutes in *pari materia;* third, by reason of the known mischief to be remedied, which was actual

loss of income to petitioner and other railroads similarly situated on account of diversion of traffic and other disabilities under which they labored during the Federal control period; fourth, with proper regard for the history of this and similar acts relating to railroad legislation during the war period and subsequent thereto, and, fifth, because any other construction would result in discrimination and injustice.

But the Circuit Court of Appeals, sustaining the District Court, narrowed the construction of Subdivision (a) of Section 204 to exclude petitioner, intimating that such narrowed construction was admitted, (whereas petitioner had strenuously argued otherwise) in the following language:

> "It seems to be admitted that the terms of Subdivision (a) of Section 204, taken alone, entitles a carrier to compensation only when it operated at a loss during the Control period." (R. 89.)

However, this court, in the case of *Continental Tie and Lumber Co.* vs. *United States*, 286 U.S. 290, 293, decided May 16th, 1932, had before it the question whether payments made under Section 204 were income, and held that:

> "* * * This section provided for such an award and payment to a railroad which during any part of the period of federal control competed for traffic, or connected, with one under federal control, and sustained a deficit in operating income for that portion of the period during which it operated its own railroad. *The act directed the Commission to compare the results of such operation with those of the test period, defined as the three years ending June 30, 1917; and, if less favorable during the period of federal control than during the test period, to award an amount calculated as prescribed by the section.* The Commission made an award and the Secretary of the Treasury paid the Railway." (Italics ours.)

This statement of the Supreme Court clearly shows that if the operation was less favorable during the period of federal control than during the test period, the railroad should be awarded the difference. The words "less favorable" do not import a loss but merely a decrease.

The same construction was placed on the words "deficit in railway operating income" in the case of *United States ex rel. Cripple Creek & Colorado Springs Railroad* v. *Interstate Commerce Commission*, 11 Fed. (2d) 554. (Certiorari denied, 273 U.S. 706). Therein the court said, at page 555:

> "Section 204 of the Transportation Act, entitled 'Reimbursement of Deficits during federal control' provided in general that a common carrier engaged in general transportation, which, during any part of the federal control period, competed for traffic or connected with a railroad under federal control, and which for the period that it operated under federal control sustained a deficit in operating income as compared with the operating income for a corresponding period of operation during the test period, the Interstate Commerce Commission should ascertain the difference in income so sustained, and the amount found should be certified by the Commission to the Secretary of the Treasury."

The Government may rely on the fact that in the *Continental Tie case*, supra, (286 U.S. 290), the railroad involved was a "red ink" railroad, as hereinabove denominated. Nevertheless the scope of the opinion of the Supreme Court is necessarily broad enough to include the petitioner within the terms of Subdivision (a) of Section 204, and is of sufficient import to show the necessity of a final determination of this particular question by this Court.

Moreover, the Circuit Court of Appeals herein, contrary to applicable decisions of this Court, construed the provi-

sions of Subdivision (a) of Section 204 in a narrow and restricted sense and so as to exclude therefrom and discriminate against those carriers which filled every other requirement therof, stating that:

> "The argument that a short line having a deficit in operating income under its own operation during Federal control is given unfair advantage over roads not suffering such deficit but producing but a small income, is beside the question, for the right of Congress to define the class of carrier entitled to benefits cannot be disputed." (R. 91.)

It is not disputed that the Congress has the right to define the class of carrier entitled to the benefits of the Act, but it is the duty of a court, in construing an act of Congress, to carry out the intent of Congress, taking into consideration the circumstances under which the Act was passed and the known mischief to be remedied. Aside from the obvious purpose of subdivision (f) of Section 204 solely to take care of carriers which had no test period operation and to which the previous provisions of the Section could not apply, which is a common legislative provision, the Circuit Court of Appeals did not, by its decision, above quoted, give a liberal interpretation to Section 204, in conflict with the case of *Piedmont & N. R. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299, 311, decided May 16, 1932, wherein this Court said:

> *"The Transportation Act was remedial legislation and should therefore be given a liberal interpretation."*

If the interpretation placed upon the purpose of the Congress in enacting Section 204 is restricted so as to cover only "red ink" carriers, it would be obviously unjust and discriminatory as to those carriers, such as petitioner, which suffered a decrease and falling off in railway operating income during the Federal control period as compared with the test period. The general rules of construction of reme-

dial statutes and their interpretation is exemplified by this Court in a decision construing an Act to quiet land titles in California wherein this Court said that:

> " * * * Those who could not show actual grants from the Mexican Government might nevertheless have equities quite as strong in their favor as those who could show an actual grant which was defective. The act of Congress should not be so construed as to except from its remedial provisions those who were without an actual grant while at the same time filling every other requirement of the act, unless the language used therein is open to no other interpretation. * * * The purpose of the act is to quiet titles in California, and, as stated by the court below, it is a remedial statute and one entitled to a liberal construction in order to effect the purpose and object of its enactment. * * * Otherwise, it seems to us clear that the purpose for which this seventh section was passed would be so circumscribed as to reduce it to much narrower limits than the known mischief to be remedied called for."
>
> Beley v. Naphtaly, 169 U.S. 353, 359-361.

To the same effect:

> Johnson v. Southern Pacific, 196 U.S. 1, 18.

The Circuit Court of Appeals seems to have assumed that the narrower definition of "deficit" and "deficit in railway operating income" should be applied because the same word and the same phrase were used in a restricted sense elsewhere.

The fact that Congress used the same word, or the same phrase, in two different sections or subdivisions of the same Act is not at all conclusive that such word or phrase meant the same in each. This Court dealt with this question in its opinion in the case of *Atlantic Cleaners & Dyers* v. *United States*, decided May 23, 1932, 286 U.S. 427, 432, 433, wherein the Sherman Anti-Trust Act was under consideration. This Court said:

"The words describing the activity declared to be illegal are the same in both sections, namely, 'restraint of trade or commerce.' The contention on behalf of appellants is that the words, being identical, should receive the same construction in section 3 as in the preceding section 1; * * * It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance."

To the same effect:

Interstate Commerce Commission vs. Alabama Midland Ry. Co., 168 U.S. 144, 166.

In Northern Pacific Ry. Co. v. *Interstate Commerce Commission,* 23 Fed. (2d) 221, 224 *(Certiorari* denied, 275 U.S. 572), the Court of Appeals of the District of Columbia dealt with Sections 209 and 212, Transportation Act, 1920, and in applying rules of construction, said:

"* * * As observed in Ozawa v. United States, 260 U.S. 178, 194, 43 S. Ct. 65, 67 (67 L. Ed. 199): 'It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning, in order that the purpose may not fail.' See, also Panama R. R. Co. v. Johnson, 264 U.S. 375, 390, 391, 44 S. Ct. 391, 68 L. Ed. 748."

Petitioner's position herein was that the Congress in the enactment of Section 204 treated the word "deficit" and the

phrase "deficit in its railway operating income" as used in Subdivision (a) thereof as meaning, and intended that they should mean, the difference between the test period income and the income during the period of Federal control, and to place a construction on subdivision (a) which would restrict the application of the Section to railroads only which suffered a loss during the Federal control period would lead to an unreasonable result, because to award reimbursement to a released railroad that sustained a loss of $1.00 in private operation during Federal control, but which had an income of $100,000.00 during the test period, while denying reimbursement to another released railroad that received an income of $1.00 in private operation during Federal control and which had an income of $100,000.00 during the test period, although both railroads sustained a decrease or falling-off in income, would be a restricted construction and lead to an unreasonable result, which would be in conflict with the decision of this Court in the case of *Piedmont & N. R. Co.* vs. *Interstate Commerce Commission,* supra, 286 U.S. 299, wherein this Court held that the Transportation Act was remedial legislation and should therefore be given a liberal interpretation.

This Court should take cognizance of this question and determine the same herein.

3. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT UNDER THE IDENTICAL SITUATION ARISING IN THE ADMINISTRATION OF THE DENT ACT (WAR MINERALS RELIEF ACT) BY THE SECRETARY OF THE INTERIOR, AND IS IN CONFLICT WITH GREAT NORTHERN RY. CO. VS. UNITED STATES, 277 U.S. 172, AND UNITED STATES VS. GREAT NORTHERN RY. CO., 53 S. Ct. 28.

The Circuit Court of Appeals herein stated (R. 91) that:

"The appellant contends that even though the Com-

mission misconstrued the Act in allowing to the railroad the sum of money which the government seeks to recover, that its act is not subject to review by the courts as the Commission had jurisdiction to determine the matter finally; that it acted judicially and that its first order must stand. This argument would be difficult to answer were the case one where the railroad had presented itself showing a deficit in its operating returns as compared with the test period and the dispute was as to the particular sum due to it. But, under the admitted facts, its case was not one which the Commission was authorized to consider at all."

The contention of the petitioner was, and is, that, after the conclusion of the war, the Congress, recognizing the losses suffered by and the damages done to the railroads, provided a method whereby the government might pay its just obligations. The Congress committed the task of determining its obligations to the Interstate Commerce Commission, not as such, but as a special tribunal to hear and determine and decide all cases coming within Section 204 as well as Section 209 of the Transportation Act.

In the case of *Great Northern Ry. Co.* v. *United States*, 277 U.S. 172, 180, in considering the duties imposed upon the Interstate Commerce Commission by the Transportation Act, this court said:

"Congress distinguished clearly, in framing Transportation Act, 1920, between provisions which were amendments of the Interstate Commerce Act and those which, while relating to railroads, were not. The amendments were grouped under title 4. The provisions here involved, which related solely to the termination of federal control, were grouped under title 2. Those which provided for the Railroad Labor Board under title 3. Because issuing certificates is not a part of the Commission's delegated power to regulate commerce, and is not

an incident of such regulation, the special remedy provided by the Urgent Deficiencies Act is not available to review the legality or correctness of its action in doing so."

Sections 204 and 209 of the Transportation Act are found in title 2 thereof and, by the express declaration of this Court, are not amendments of the Interstate Commerce Act, and the remedies provided for the review of the legality or correctness of the Commission's action under these sections are not governed by the Interstate Commerce Act.

This court further said in the same case at page 180:

"The function imposed upon the Commission by Section 209 is solely that of determining the amount required to make good the government's guaranty. It is not an exertion of the delegated power to regulate interstate commerce. It is an incident of the World War—a temporary, nonrecurrent task, which might appropriately have been performed for the Treasury by its Comptroller or auditors, or by other trusted official."

Great Northern Ry. Co. v. United States, 277 U.S. 172, 180.

Thus the functions of the Interstate Commerce Commission in performing this particular temporary, nonrecurrent task were such as might have been committed to the Secretary of the Interior or the Secretary of War, or any other official.

After the war the Government had many obligations to meet. Among other things it passed an act, known as the Dent Act, on March 2, 1919, (Chapter 94, 40 Stat. 1272, amended Nov. 23, 1921, C. 137, 42 Stat. 322), to provide relief in cases of contracts connected with the prosecution of the war, and also to provide for the payment of losses suffered by persons by reason of producing or preparing to produce manganese and other specified minerals in compliance with the request and demand of certain depart-

ments of the government. That act is sometimes referred to as the War Minerals Relief Act. Sections 1, 2, 3 and 4 thereof provide for relief to the contractors and protection for the subcontractors. By special provision the Secretary of War was required to report all settlements to the Congress, and Congress reserved to itself, or agencies appointed by it, the right to review any such settlements, and to the government the right to recover any money fraudulently paid. By section 2 of that act the Court of Claims is given jurisdiction to consider the claim of any person who is dissatisfied with the action of the Secretary of War.

By Section 5 of the same act the Congress committed the administration of the war minerals relief features thereof to the Secretary of the Interior, with power to adjust claims thereunder. Like Sections 204 and 209 of the Transportation Act, and unlike the previous sections of the same act, where a right of review of the Secretary of War's action is specifically reserved by the Congress, no provision was made for the review of the Secretary of the Interior's action in connection with war minerals relief under Section 5.

What happened in the construction of Section 5 of the Dent Act is a striking example of what this Court holds with reference to the finality of action in connection with these matters, both upon questions of law and fact, where no review is provided.

One Rives presented a claim under Section 5 to the Secretary of the Interior on account of moneys lost by reason of a contract of purchase of a manganese mine, which mine became worthless after the armistice, and upon which he had lost the sum of $9,000.00. The Secretary of the Interior denied this claim because, in his opinion, it did not come within Section 5 as a matter of law, in that Section 5 covered only moneys expended upon property in producing or preparing to produce manganese, and did not include the purchase price thereof. Rives commenced an action in the Supreme Court

of the District of Columbia seeking a writ of mandamus to compel the Secretary of the Interior to adjust his claim. This proceeding reached the Supreme Court of the United States. In denying the claimant Rives any relief, this Court said:

> "Congress intended the Secretary to act for it, and to construe the meaning of the words used to describe the elements of the net losses to be ascertained and to give effect to his interpretation without the intervention of the courts. This statute presents a case of as wide discretion as was held to have been vested in the Secretary of the Navy in the Decatur case."
>
> Work v. Rives, 267 U.S. 175, 182.

In this same case this Court held, speaking of Section 5, that:

> "Congress did not wish to create a legal claim. It was not dealing with vested rights. It did not, as it did with the claims for supplies and services directly furnished the government under the first and second sections of the act, make the losses recoverable in a court, but expressly provided otherwise. It dealt with the subject with the utmost caution. * * * It vested the Secretary with power to reject all losses except as he was satisfied that they were just and equiable and it made his decision conclusive and final. * * * ."
>
> Work v. Rives, 267 U.S. 175, 181, 182.
>
> To the same effect:
>
> Work v. Chestatee Co., 267 U.S. 185, 187.

Parenthetically, the same finality attaches to the certificate of the Interstate Commerce Commission as a special tribunal under the provisions of Section 212 (a) of the Transportation Act 1920, (Appendix p. 49). In the case of *United States* v. *Great Northern Ry. Co.*, 53 S. Ct. 28, 31, 32, this Court specifically held a certificate issued under Sections 209 (guaranty to carriers under Federal control at the time Federal control terminated) and 212(a) to be final and

conclusive under the terms of the Act itself, and also in conformity with the intent of Congress in enacting the same. No distinction of any kind can be made between Section 5 of the Dent Act, and the cases construing it, and Sections 204, 209, and 212 of the Transportation Act, and the cases construing these sections as herein set out.

After the decision in the case of *Work* v. *Rives*, 267 U.S. 175, above quoted, the Congress, by Act of February 13, 1929, 45 Stats. 1166, authorized the Supreme Court of the District of Columbia to review the final decision of the Secretary of the Interior upon any question of law arising under Section 5 of the Dent Act.

Thereafter the Vindicator Consolidated Gold Mining Company, having been denied a claim based upon its investment in manganese mines, brought an action to review the decision of Secretary Wilbur, the then Secretary of the Interior, in denying a claim similar to that denied Rives in the *Work* case.

This Court affirmed the judgment of the Circuit Court of Appeals in granting the relief, holding that the Secretary of the Interior placed an erroneous construction upon Section 5 in failing to allow such claims, but that the above amendment permitted review on questions of law.

> Wilbur, Secretary, vs. United States ex rel. Vindicator Gold Mining Company, 284 U.S. 231, 234, decided December 7, 1931.

To the same effect:

> Wilbur, Secretary, vs. United States ex rel. Chestatee P. & C. Corporation, 53 Sup. Ct. 293, 294, decided January 16, 1933.

The *Work* case was decided March 2, 1925, and prior to the time when Congress had authorized a review of the Secretary's decisions on questions of law. The Congress has never authorized a review of the decisions of the Interstate Commerce Commission in the administration of the railroad relief

provided by Sections 204, 209 and 212 of the Transportation Act, and, by parity of reasoning, the rule must be the same as that enunciated in the *Work* case.

This is not a new rule. It was recognized by the Supreme Court of the United States as early as 1851 in the case of *United States* v. *Ferriera,* 13 Howard (U.S.) 39. In that case the Congress, for the purpose of adjusting claims under a treaty with Spain, provided that a judge of the United States District Court in Florida would investigate claims and submit his findings to the Secretary of the Treasury, who might approve or disallow the award. An attempt was made to appeal from the decision of the judge in the allowance of a claim. This court said, at page 47:

> "The decision is not the judgment of a court of justice. It is the award of a commissioner. The act of 1834 calls it an award. And an appeal to this court from such a decision, by such an authority from the judgment of a court of record, would be an anomaly in the history of jurisprudence. An appeal might as well have been taken from the awards of the board of commissioners, under the Mexican treaty, which were recently sitting in this city. * * * *It cannot afterwards be disturbed by an appeal to to this or any other court, or in any other way, without the authority of an act of Congress."* (Italics ours.)
>
> United States v. Ferriera, 13 Howard (54 U.S.) 39, 47.

To the same effect:

United States vs. Arredondo, 6 Peters 691, 728.

The above cases are clearly applicable herein, and, in the language of this Court last quoted, where the Congress provides for the adjustment of claims against the government and commits them to any tribunal for decision "it cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an Act of Congress." When the Secretary of the Interior denied the

manganese claims purely on questions of law, and this Court, in *Work* v. *Rives*, 267 U.S. 175, supra, held his decisions final, the Congress of the United States passed a special act authorizing the review of such decisions on questions of law only. Thereafter, in *Wilbur* v. *Vindicator Gold Mining Co.*, 284 U.S. 231, supra, this Court, having then been given the authority to review the decisions of the Secretary on questions of law, found that the Secretary was in error in his interpretation of the law, though Rives had formerly been denied relief under similar circumstances because there was no Act of Congress authorizing a review.

The above cases are submitted herein to show a conflict between the principles enunciated in applicable decisions of this Court and the opinion of the Circuit Court of Appeals in the instant case, which should be resolved by this Court.

4. THE DECISION OF THE CIRCUIT COURT OF APPEALS HEREIN ON THE QUESTION OF THE FINALITY OF THE ACTION OF THE COMMISSION IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT IN THE CASES OF GREAT NORTHERN RY. CO. vs. UNITED STATES, 277 U.S. 172 and UNITED STATES vs. GREAT NORTHERN RY. CO. 53 Sup. Ct. 28, AND THE DECISION OF THE COURT OF CLAIMS IN THE CASE OF WYANDOTTE TERMINAL RAILWAY vs. UNITED STATES, 64 COURT OF CLAIMS 328, (CERTIORARI DENIED, 276 U.S. 630), AND THE DECISIONS OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA IN THE CASES OF UNITED STATES EX REL. C. C. ETC. RY. vs. INTERSTATE COMMERCE COMMISSION, 11 FED. (2d) 554, (CERTIORARI DENIED, 273, U.S. 706), AND UNITED STATES EX REL. ABILENE, ETC. RY. CO. vs. INTERSTATE COMMERCE COMMISSION, 8 FED. (2d) 901, (CERTIORARI DENIED, 270 U.S. 650).

The Circuit Court of Appeals held herein:

"But, under the admitted facts, its case was not one

which the Commission was authorized to consider at all. It has been clearly settled that the Courts have full right when appealed to, to determine by independent hearing, whether agencies of the government to which have been committed duties involving the exercise of administrative functions, or powers of a judicial nature, have exercised their powers with respect to the particular persons or subject matter designated by Congress. If the power is lacking the act is void." (R. 91.)

Undoubtedly Courts have the right to determine originally the purpose and effect of any statute, just as this Court determines the purpose and effect of the provisions of the Constitution of the United States, in any appropriate hearing, independent or otherwise. Such determination becomes the foundation upon which the rights of the parties litigant are to be declared. It is submitted that the Courts may have further functions, but this is not necessarily so. Two examples may be given.

If the purpose and effect of the statute, as so determined by the Court, be to vest an agency of the government with power to construe the statute and apply such construction to the facts, then the Courts can not be appealed to in the absence of specific statutory provisions for review. Such are the instant case and the case of *Work* vs. *Rives,* supra, 267 U.S. 175.

On the other hand, if the purpose of the statute be to vest an agency of the Government with the limited authority of applying the provisions of the statute to the facts in the case under consideration, the courts can again be appealed to, and, in the event that the agency of the Government erroneously construes or applies the statute, the Courts may proceed, by review, mandamus, appeal, statutory or otherwise, to correct the error. Such is the case of *Wisconsin Central Ry.* vs. *United States,* 164 U.S. 190, cited by the Circuit Court of Appeals herein. (R. 92.)

As this Court said in *Work* vs. *Rives*, supra, 267 U.S. 175, 177, 178:

> "Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such a case can control by mandamus his interpretation, even if it may think it erroneous. The cases range, therefore, from such wide discretion as that just described to cases where the duty is purely ministerial, where the officer can do only one thing, which on refusal he may be compelled to do. * * * Between these two early and leading authorities, illustrating the extremes, are decisions in which the discretion is greater than in the *Kendall Case* and less than in the *Decatur Case*, and its extent and the scope of judicial action in limiting it depend upon a proper interpretation of the particular statute and the congressional purpose."

The position of petitioner throughout has been that the Interstate Commerce Commission was given by Section 204, and had, the power and discretion to determine what carriers were within the Act and entitled to reimbursement, as well as the amount of such reimbursement. The power was not lacking, the determination of the Commission was valid and final, as decided by the Courts in the cases herein, and the Courts cannot again be appealed to for determination of the correctness of the Commission's action under such power and in accordance with such discretion, there being no statutory provisions for review thereof.

In speaking of the Interstate Commerce Commission, this Court has said:

> "In some matters its duty is merely to investigate and to report facts. (Citing cases) *In others, to make determinations.* See *Great Northern Ry. Co.* v. *United States*, 277 U.S. 172, 48 S. Ct. 466, 72 L. Ed. 838. In some, it acts in an advisory capacity. (Citing cases.) In others in a supervisory." (Italics ours.)

United States v. Atlanta B. & C. R. Co., 282 U.S. 522, 527.

Moreover, this Court in its decision in *Great Northern Ry. Co.* v. *United States*, supra, cited in the foregoing quotation, recognized the application of the principles enunciated in the case of *Work* v. *Rives*, supra, 267 U.S. 175, to Section 209 of the Transportation Act, in the following language:

> "We have no occasion to inquire whether a remedy at law or some other remedy in equity is available. The mere fact that the certificate may be conclusive, if it be a fact, would not entitle the company to a judicial review. Compare United States v. Babcock, 250 U.S. 328, 331, 39 S. Ct. 464, 64 L. Ed. 1011; Work v. Rives, 267 U.S. 175, 45 S. Ct. 252, 69 L. Ed. 561."
>
> Great Northern Railway Co. v. United States, 277 U.S. 172, 182.

Thereafter, in the case of *United States v. Great Northern Railway Company*, supra, decided November 7th, 1932, 53 S. St. 28, 31, 32, which was a suit by the Government to recover moneys paid to the Great Northern Railway Company under Sections 209 and 212, this Court held that such certificates were final, and that such was the intention of the Congress, thereby resolving the uncertainty appearing in the quotation from *Great Northern Railway Company* v. *United States*, just quoted. Therefore the conclusive character of the determination in the *Work* case (*Work* v. *Rives*, supra, 267 U.S. 175), is clearly the doctrine that should apply in the instant case.

This Court furthermore has expressly recognized the above principle that if the agency of the Government acts within its authority and there is no mistake of fact, the Government is precluded from recovering payments made to carriers under Federal control at the termination of Federal control under Section 209 (Guaranty section), and Section 212, and has expressly distinguished the case of *Wisconsin Central*

Ry. Co. v. *United States,* 164 U.S. 190, and similar cases, (cited by the Circuit Court of Appeals herein, R. 92), in the case of *United States* v. *Great Northern Ry Co.,* supra, 53 S. Ct. 28, 31. In that case this Court said:

> "'In these circumstances we find no basis for a holding that the payment made to the respondent under the partial certificate of March 1, 1921, was due to any mistake of fact, either unilateral or mutual. United States v. Barlow, 132 U.S. 271, 280, 281, 10 S. Ct., 77, 33 L. Ed. 346. Cf. Gordon v. Butler, 105 U.S. 553, 557, 558, 26 L. Ed. 1166. The officials of the government knew precisely what they were doing, and kept well within the statute defining their authority. They did not act illegally like the officials whose acts were challenged in the cases cited by the petitioner. Wisconsin Central Railroad Co. v. United States, 164 U.S. 190, 17 S. Ct. 45, 41 L. Ed. 399; Grand Trunk Western Railway Co. v. United States, 252 U.S. 112, 40 S. Ct. 309, 64 L. Ed. 484; Burnet v. Porter, 283, U.S. 230, 51 S. Ct. 416, 75 L. Ed. 996. Charged with a difficult task exacting judgment and discretion, they came to a decision in good faith with knowledge of the relevant facts and without departure from the law. If the payment under their certificate is to be reclaimed, some other ground than mistake or illegality must be found to sustain the reclamation."

Since, as has been heretofore shown, the Commission was given power under Sections 204 and 212 to construe the statute and determine the facts, to wit: To determine what carriers came within the provisions of Section 204, as well as the amount of reimbursement to be awarded to each (compare *Work* v. *Rives,* supra, 267 U.S. 175; *United States* v. *Ferriera,* supra, 13 Howard 39), then the Commission kept within the authority granted it and did not depart from the law, and did not act illegally. An erroneous construction of the statute as alleged in the complaint, if the construction be

erroneous, which is not conceded, made by the agency of the Government having authority to construe the statute, is not such an illegality as is contemplated by the above language of this Court. Since no mistake of fact was alleged herein and no illegality appears herein, because the legality of the construction depends on the authority to construe, there is nothing in the instant case to permit a review by the Courts, statutory, or otherwise, or to sustain reclamation.

Parenthetically, no fraud is alleged or appears herein as ground for relief.

Nor does it avail the Government herein that the Commission, after a change in personnel, and almost two years after issuance of its certificate and payment of reimbursement to petitioner under Section 204, attempted to reverse its decision and award and rescind its settlement with petitioner. The principles hereinbefore discussed, denying to the Courts the authority to review decisions of the Commission herein, are equally prohibitive of any subsequent action by the Commission itself. The finality attached to the certificate itself under Section 212 (a) and as intended by the Congress (compare *United States* v. *Great Northern Ry. Co.*, supra, decided November 7th, 1932, 53 Sup. Ct. 28, 31, 32) precludes such subsequent action. Nor does Title II of the Transportation Act, by amendment or otherwise, contain any statutory provision authorizing the Commission to grant rehearings and correct miscalculations (compare *Work* v. *Rives*, supra, 267 U.S. 175, 180, 182).

The Circuit Court of Appeals herein, immediately following its statement last hereinbefore quoted and here discussed, cited the following cases to sustain this statement:

Crowell v. Benson, 285 U.S. 22;

Interstate Commerce Commission v. Ill. Cent. R.R., 215 U.S. 452;

Southern Pacific Co. v. Interstate Commerce Commission, 219 U.S. 433;

Interstate Commerce Commission v. Union Pacific R.R., 222 U.S. 541;

Tagg Bros. & Moorehead v. United States, 280 U.S. 420, at page 442.

It is respectfully submitted that not one of these cases has any bearing on the question involved, and that the decisions of this Court hereinbefore discussed are controlling. As already shown under the holding of this Court in the case of *Great Northern Ry. Co.* v. *United States*, supra, 277 U.S. 172, 180, the Commission under Section 204 was not acting as the Interstate Commerce Commission but as a special tribunal.

The Circuit Court of Appeals fell into error by assuming that Section 204 of the Transportation Act was an amendment of the Interstate Commerce Act, in stating (R. 84), that:

> "The Transportation Act, approved February 28, 1920 (41 Stats. page 456), which amended the Interstate Commerce Act, provided (Sec. 204) that the Federal control of the railroads should terminate on March 1, 1920."

Section 204 of the Transportation Act is not an amendment of the Interstate Commerce Act, nor any part of the Interstate Commerce Act, and the procedure to be followed in determining the rights of claimants and of the Government under Section 204 is not governed by the Interstate Commerce Act. This Court has said so in the case of *Great Northern Ry. Co.* v. *United States*, supra, 277 U.S. 172, 180, as follows:

> "Congress distinguished clearly, in framing Transportation Act, 1920, between provisions which were amendments of the Interstate Commerce Act and those which, while relating to railroads, were not. The amendments were grouped under title 4. The provisions here involved, which related solely to the termination of fed-

eral control, were grouped under title 2. Those which provided for the Railroad Labor Board under title 3. Because issuing certificates is not a part of the Commission's delegated power to regulate commerce, and is not an incident of such regulation, the special remedy provided by the Urgent Deficiencies Act is not available to review the legality, or correctness of its action in doing so."

Notwithstanding these declarations by this Court, showing clearly that the Interstate Commerce Act had no relation to the functions of the Interstate Commerce Commission in the adjustment of these railroad claims, still the Circuit Court of Appeals cited the three Interstate Commerce Commission cases to sustain its right to review the action of the Commission. That Court also cited *Crowell* v. *Benson*, 285 U.S. 22, a case arising under the Longshoremen's and Harbor Workers' Compensation Act, (March 4, 1927, c. 509, 44 Stat. 1424). Section 21 of that Act provides for a review by the court, and that case itself expressly recognizes this fact. Again, the Circuit Court of Appeals cited in support of its conclusion *Tagg Bros. & Moorehead* v. *United States*, 280 U.S. 420, a case arising under the Packers' and Stockyards' Act (August 15, 1921, c. 64, Sec. 301 to 316, 42 Stat. 163). Section 316 of that Act specifically provides for a review of all orders in connection therewith, in the same manner as orders made by the Interstate Commerce Commission as such.

In treating Section 204 as an amendment to the Interstate Commerce Act, the Circuit Court of Appeals no doubt assumed that the orders of the Commission were reviewable under the Interstate Commerce Act as such.

The cases cited by the Circuit Court of Appeals, as heretofore pointed out, have no application to the question of a review of the award of reimbursement to petitioner because they are cases where a review was specially provided by the Act of Congress in each case, where none is provided in the

instant case.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals herein, in reviewing the decision of the Commission and in sustaining reclamation, is in conflict with the decisions of this Court hereinbefore discussed, and is not supported by the cases cited by that Court.

In addition to the finality attached to the determination of the Commission herein, as decided by this Court, the decision of the Circuit Court of Appeals herein is in conflict with the decisions of the Court of Claims and the Court of Appeals of the District of Columbia, directly in point as involving the finality of and lack of review of decisions rendered by the Interstate Commerce Commission under Section 204.

The Court of Claims said:

> "Congress under the provisions of the aforesaid act, and Section 204 thereof, created *a special remedy applicable to a certain class of cases well defined in the act, and conferred upon a special tribunal the power to act in such cases, a tribunal especially equipped to deal with such cases. The statute creates a right and provides a special remedy, and that remedy, we think, is exclusive. In this case the special tribunal finds that there is nothing due to the plaintiff under the provisions of the act, and no remedy is provided by which the plaintiff can question this decision. The purpose of Congress was to settle this class of claims, and to settle them in the manner prescribed by the terms of the act, otherwise in every case the party who might feel aggrieved by the action of the commission might bring suit in this court for the purpose of upsetting every award of the Commission, whether the party was awarded something or nothing. If this can be done, the purpose of Congress to bring about a settlement of*

this class of claims in a manner which it specially prescribes will be defeated.

"We do not think that the decision of the Commission in this case is subject to review by this court. United States v. Babcock, 250 U.S. 328, and cases there cited." (Italics ours.)

Wyandotte Terminal R. R. Co. v. United States, 64 Court of Claims, 328; (*Certiorari* denied, 276 U.S. 630).

The Court of Appeals of the District of Columbia said:

"The statute here under consideration provides for the payment of a deficit to railroads not under Federal operation; the deficit to be ascertained by the Interstate Commerce Commission in the manner provided in the Transportation Act. *This duty imposed upon the Commission is judicial in character, calling for a determination, not only upon the facts arising in the particular case, but for an interpretation of the law applicable thereto.* This, we think calls for more than a mere ministerial act, to be performed by the Commission under express direction of law. It invokes the exercise of judicial discretion which cannot be controlled by the writ of Mandamus." (Italics ours.)

United States ex rel. Abilene, Etc., Ry. Co. v. Interstate Commerce Commission, 8 Fed. (2d) 901, 902; (*Certriorari* denied, 270 U.S. 650).

The Court of Appeals of the District of Columbia also said:

"We have reviewed this case at considerable length, in order that the numerous errors committed by the commission, growing out of its refusal to treat the combined lines as a 'system of transportation,' may become apparent. These errors, however, we are unable to correct in this proceeding. This is not a case where the commission has, for any reason, refused to assume

jurisdiction of the case, as in Kansas City Southern Railway Co. v. Interstate Commerce Commission, 40 S. Ct. 187, 252 U.S. 178, 64 L. Ed. 517; but it falls within our holding in U.S. ex rel. Abilene & Southern Railway Co. v. Interstate Commerce Commission, 8 F. (2d) 901, 56 App. D.C. ——. *The Commission has construed the statute and applied its construction to the facts, and, however erroneous, its conclusions, under recent decisions of the Supreme Court, are beyond our jurisdiction to correct in this proceeding.*" (Italics ours.)

United States ex rel. C. C. etc. Ry. v. Interstate Commerce Commission, 11 Fed. (2d) 554, 556; *(Certiorari* denied, 273 U.S. 706).

To the same effect:

United States ex rel. Empire & S. E. Ry Co. v. Interstate Commerce Commission, 45 Fed. (2d) 293, 294; *(Certiorari* denied, 283 U.S. 834).

True, these cases were cases where the Commission had denied relief to the claimant and the claimant was attempting to obtain relief in the courts. These courts, following the rules announced by this Court in other cases, held that the action of the Commission, no review having been authorized by Congress, was final and conclusive.

This Court should determine whether the citizen is to be bound by the decisions of the Commission in this class of cases because the Congress provided no right of review, while the Government of the United States is to be given that right.

5. THE DECISION OF THE CIRCUIT COURT OF APPEALS HEREIN ON THE QUESTION OF REIMBURSEMENT TO PETITIONER IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN THE CASES OF CONTINENTAL TIE AND LUMBER CO. v. UNITED STATES, 286 U.S. 290, McKNIGHT v. UNITED STATES, 98 U.S. 179, AND UNITED STATES v. HILL, 120 U.S. 169.

The Circuit Court of Appeals herein held (R. 92):

"The United States may demand repayment of money

paid out by its officers or agents where no authority of law exists for such payment. Persons so receiving public funds are charged with knowledge that they have taken that to which they have not the right, and are bound, upon demand, to return it. Decisions determining the question differently where private parties are wholly concerned, are not pertinent. No estoppel as for voluntary payment can be claimed to defeat the suit of the Government."

The Circuit Court of Appeals thus decided that the question herein might have been determined differently were private parties wholly concerned. This is contrary to the applicable decisions of this Court, holding that the rules of law which apply to the Government and to individuals are the same. This Court, in *McKnight* v. *United States*, 98 U.S. 179, 185, said:

"It is true the assignment was contrary to law, and therefore, a nullity, but there was nothing contrary to good morals or conscience in the payment or receipt of the money. The facts were all known. There was no indirection, concealment, or improper purpose on either side. * * * Under the circumstances, it is quite clear that if the controversy were between private parties, there could be no recovery. I Story, Contracts, Sect. 541. With a few exceptions, growing out of considerations of public policy, the rules of law which apply to the government and to individuals are the same. There is not one law for the former and another for the latter."

Again, in *United States* v. *Hill*, 120 U.S. 169, 182, action was brought by the Government to recover damages for defendant's failure as a clerk of court to account for certain fees he had received. In denying recovery, this Court said:

"With this long practice, amounting to a contemporaneous and continuous construction of the statute, in a case where it is doubtful whether the statute requires

a return of the disputed fees, judges of eminence, heads of departments, and accounting officers of the treasury having concurred in an interpretation in which those concerned have confided, the surety in the present bond, as well as his principal, had a right to rely on that interpretation in giving the bond; and the semi-annual accounts of the principal having been actually examined and adjusted at the Treasury, with the naturalization fees excluded, down to and including the one last rendered five months before this suit was brought, *a court seeking to administer justice* would long hesitate before permitting the United States to go back, and not only as against the clerk, but as against the surety on his bond, *reopen what had been settled with such abundant and formal sanction. This principle has been applied, as a wholesome one, for the establishment and enforcement of justice, in many cases in this court, not only between man and man, but between the government and those who deal with it, and put faith in the action of its constituted authorities, judicial, executive and administrative.*" (Italics ours.)

In view of the above decisions of this Court, it is submitted that the decision of the Circuit Court of Appeals was based upon an erroneous assumption that the question should be decided differently, where the government is involved. This should move this Court to hear the case and decide the question itself on the principles enunciated in the cases of *McKnight* v. *United* States, 98 U.S. 179, supra, and *United States* v. *Hill*, 120 U.S. 169, supra.

Continuing, the Circuit Court of Appeals herein said (R. 93):

"No conditions are present like those where a person has contracted with a government agency and received payment in return for a consideration actually rendered by him (as the performance of work) and it has later

been discovered that the contract was not legally authorized. Here the railroad company returned nothing to the government in exchange for the money received. * * * ."

This Court in two recent cases decided on May 16, 1932, *Texas & Pac. Ry Co.* v. *United States,* 286 U.S. 285, 289, considering Section 209, and *Continental Tie & Lumber Co.* v. *United States,* 286 U.S. 290, 293, supra, considering Section 204, has specifically held otherwise.

In the latter case this Court said:

"What we have said in Texas & Pacific Railway Co. v. United States, decided this day, 286 U.S. 285, is determinative of the first contention. Section 209 of the Transportation Act (49 U.S.C.A., Sec. 77) guaranteed the payment of any deficiency below a fixed minimum of operating income for the six months ensuing the termination of federal control to railroads which had been taken over by the United States. By the terms of Section 204 payment was to be made to railroads not under federal control of a proportion of any operating deficit suffered in the period of such control. The underlying purpose of Congress was the same in both cases. Railroads falling within section 204 were principally short lines. They were known to have suffered serious losses in income due to routing arrangements and other administrative measures made necessary by government operation of the larger railroad systems. The transportation act did not contemplate that the payments to be made pursuant to section 204 were in any sense just compensation for the taking of property. There was no room for such reimbursement, as the short lines were during the time to which the section applied in the possession and management of their owners. Congress, nevertheless, realized that federal operation had caused them consequential losses, at least partial redress

for which was the purpose of the section where actual deficits in income had resulted. For the reasons set forth in Texas & Pacific Ry. Co. v. United States, supra, we hold that these payments were not subsidies or bonuses, but were income within the intent of the amendment and the statute."

Continental Tie & Lumber Co. v. United States, 286 U.S. 290, 293.

These cases arose under the Federal Income Tax Law, and considered the question as to whether the payments made under these sections to the railroads were subsidies or taxable income, and in both cases it was held that such payments were taxable income. If the railroads had surrendered nothing in exchange for such payments, they could not have been considered income, and therefore, the question was directly involved, and the conflict should be resolved by this Court.

6. THE DECISION OF THE CIRCUIT COURT OF APPEALS HEREIN ON THE QUESTION OF SETTLEMENT IS IN CONFLICT WITH THE DECISIONS OF THE COURT OF CLAIMS IN THE CASE OF STANDARD STEEL CAR CO. v. UNITED STATES, 60 COURT OF CLAIMS, 726, AND OF THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT IN THE CASE OF D'OLIER ENGINEERING CO. v. UNITED STATES, 244 Fed. 90.

The Circuit Court of Appeals herein held (R. 92):

"The added contention of appellant that the settlement made was one of compromise does not make a different case because the railroad company was not entitled to any amount under the facts as admitted."

In the case of *Standard Steel Car Co.* v. *United States*, 60 Court of Claims 726, which arose under the Dent Act, the Court of Claims said:

"It is contended that the action set up in the counterclaim is not one to set aside the award made by the

Secretary of War, and while it is entirely true that the relief sought is not so in terms pleaded it is sought to recover the amount, or very nearly the entire amount, two items being excepted, *awarded to the plaintiff by the Secretary of War, paid pursuant to that award, and accepted by the plaintiff in satisfaction of its claim*, and even though it be not prayed that the award be set aside, that must undoubtedly be the effect of the rendition of a judgment for the recovery of the amount awarded and paid. *A determination of the merits of the counterclaim on the facts must necessarily involve a 'review' (a word found in the statute)* of the award, and if a judgment for the recovery of the money awarded and paid could be rendered without having the effect of setting aside the award, even though not so decreed in terms, the plaintiff would remain the beneficiary of an award duly accepted and paid but converted into an anamalous sort of *a nudum pactum* by the requirements that it surrender the fruits. *We cannot escape the effect of an action by contention as to the name with which we will christen it.*" (Italics ours.)

The effect of permitting the Government to recover in the instant case would be to set aside the compromise, settlement, and award of the Commission.

This Court has held in the case of *United States* v. *Justice*, 81 U.S. 535, 549, that:

"It is always in the power of parties to compromise their differences. One way of doing this is by arbitrators, mutually chosen, but from such submission neither party is at liberty to withdraw after the award is made. The condition of the government creditor is better than this, for if dissatisfied with the allowance made him by the commission, he can refuse to receive it, or can accompany his receipt of it, if he chooses to

take it, with a proper protest. This protest is necessary to inform the government that the compromise is rejected, and that this rejection leaves the claimant free to litigate the matter in dispute before the Court of Claims. If with this knowledge and under these circumstances the money is paid, there can be no just cause of complaint *on either side*, and the status of the parties is not affected by anything which transpired before the Commission." (Italics ours.)

Had this controversy arisen between individuals there would not have been the slightest basis for the maintenance of this action. Petitioner presented its claim to the Interstate Commerce Commission in excess of $600,000. In response to this it was offered a sum less than $500,000 conditioned that it be accepted in full settlement, discharge and release. This offer was accepted and a written acceptance and release executed (R. 44-46). No more direct, positive example of compromise and settlement could possibly be imagined and, under the law as between private individuals, no doubt could arise as to the right of the appellant to retain the money so received.

As previously shown, the rule is well recognized and has been frequently stated by this Court that, with few exceptions, rules of law apply to the government and individuals alike; there is not one law for the former and another for the latter.

The Circuit Court of Appeals herein further said (R. 93):

"Plaintiff had only to show that the money was improperly paid as described. What use appellant thereafter made of it is immaterial. No estoppel can be claimed because it disbursed the fund and was taxed because of the possession and claimed ownership of it. The decisions cited affirming the right of the United States to recover public money so paid out without authority of law, as a corollary must imply that there is

no estoppel under conditions such as this case presents."

In the case of *D'Olier Engineering Co.* v. *United States*, 244 Fed. 90, the Circuit Court of Appeals for the Third Circuit had under consideration a settlement made by the government with the plaintiff in connection with the furnishing of boilers in the plants of the Panama Canal. It appears that the government was to pay a stipulated price for the boilers, based among other things on a rating of 72 per cent. efficiency. After the installation of the boilers a test was to be made by a government engineer and a representative of the plaintiff and settlement made thereon. An admitted mistake was made by the engineers, and the boilers were overrated to the extent that the plaintiff was overpaid some thousands of dollars more than it would have been had the rating been made in accordance with the contract. An action was brought by the government to recover the amount so paid. The lower court, while recognizing the principle of compromise, found that the money was not paid "in compromise of a claim in dispute" and authorized a recovery on the part of the government. On appeal the Circuit Court of Appeals vacated the judgment and said:

> "It will thus be noted that this action at law while in form for the recovery of money mistakenly paid under the contract of November 17, 1908, is in reality the annulling of the settlement of February 28, 1910, so made by the parties, of all matters in dispute under said contract. This suit is not to enforce any contract, express or implied, but it seeks to invalidate a settlement contract that has already been performed, and that without either the willingness expressed or the power possessed to restore the parties to their previous status. By this suit the government forecloses and excludes all those equitable considerations and plastic powers which a chancellor could exercise were this a

bill to rescind the agreement of settlement."

D'Olier Engineering Co. v. United States, 244 Fed. 90, 94.

In *Walker* v. *United States,* 139 Fed. 409 (Aff'd 148 Fed. 1022), it was held that where a marshal has in good faith rendered accounts against the United States, covering service of his deputies, which have been audited and allowed by the proper accounting officers, and paid in accordance with the rules which had previously been recognized as governing such allowances and with knowledge that the greater part of the money would be paid over to the deputies rendering the services, the governmnt is not entitled to recover the sum so paid the marshal, after years have elapsed and he has gone out of office, even though the allowance may have been made under an erroneous construction of the law. The court said at page 413:

> "The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject-matter between man and man."

In view of the recent decision of this Court in the case of *Continental Tie & Lumber Company* v. *United States,* supra, 286 U.S. 290, that the award under Section 204 is income, constituting reimbursement to shortline railroads for losses sustained by reason of government control of railroads, the loss being recognized and the moral obligation being fulfilled, in equity and good conscience petitioner should retain the reimbursement awarded and the government should not be permitted to recover back the money paid.

The loss to petitioner, for which it was reimbursed, is just as much a loss, though a decrease in railway operating

income during the Federal control period as compared to the test period, as if solely a loss during the Federal control period. This last point is raised herein, on the ground that the decision of the Circuit Court of Appeals is at variance with the cases next hereinbefore cited, as well as on the ground that it is desired by this Court that all questions involved shall be set out in the petition for a writ of certiorari.

CONCLUSION.

It is respectfully submitted that:

1. The question of Federal law involved in this case is a most important one and should be settled by this Court. This petitioner, and other short line railroads similarly situated, which suffered a decrease in railway operating income during the Federal control period as compared with the test period operations, should be entitled to a solution of the conflict existing between the decision of the Circuit Court of Appeals herein and the various decisions of this Court and of the Circuit Courts of Appeals, the Court of Appeals of the District of Columbia and the Court of Claims, herein discussed, on the various questions involved.

2. The decision of the Circuit Court of Appeals, in construing Subdivision (a) of Section 204 of the Transportation Act, is shown to be in conflict with the decisions of this Court and other courts which have considered the matter as to the proper meaning of this subdivision.

3. Regardless of the proper interpretation to be given to Subdivision (a) of Section 204, the decision of the special tribunal to whom Congress committed the administration of this Act, is shown by decisions of this Court and several other courts, to be final and conclusive, and not subject to review as held by the Circuit Court of Appeals.

4. The Circuit Court of Appeals, in deciding that, without regard to the fact that this money was paid as the result of a compromise and settlement, the government can still

recover, is in conflict with the decisions of this Court and many courts of the country, as herein shown.

5. The decision of the Circuit Court of Appeals, to the effect that the government can disregard this settlement and sue for money had and received, which the petitioner in equity and good conscience should be permitted to retain, without setting aside the settlement or without restoring the petitioner to its status quo, is contrary to the decisions of this Court and the courts of the country generally.

It is, therefore, respectfully urged that this Court grant the Writ of Certiorari petitioned for herein.

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APPENDIX.

Excerpts from the Transportation Act of 1920:

"Reimbursement of Deficits During Federal Control.

"Section 204. (a) When used in this section—

"The term 'carrier' means a carrier by railroad which, during any part of the period of Federal Control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation; but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; and

"The term 'test period' means the three years ending June 30, 1917.

"(b) For the purpose of this section—

"Railway operating income or any deficit therein for the period of Federal control shall be computed in a manner similar to that provided in section 209 with respect to such income or deficit for the guaranty period; and

"Railway operating income or any deficit therein for the test period shall be computed in the manner provided in section 1 of the Federal Control Act.

"(c) As soon as practicable after March 1, 1920, the Commission shall ascertain for every carrier, for every month of the period of Federal control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if

any (hereinafter called 'Federal control return'), and the average of its deficit in railway operating income, if any, and of its railway operating income, if any, for the three corresponding months of the test period taken together (hereinafter called 'test period return'): *Provided,* That 'test period return,' in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during the test period taken together, during which the carrier operated its railroad or system of transportation.

"(d) For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the Commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, or (2) the difference between its test period return, if an income, and its Federal control return, if a smaller income, or (3) the sum of its Federal control return, if a deficit, plus its test period return, if an income. The sum of such amounts shall be credited to the carrier.

"(e) For every such month the Commission shall then ascertain (1) the difference between the carrier's Federal control return, if an income, and its test period return, if a smaller income, or (2) the difference between its test period return, if a deficit, and its Federal control return, if a smaller deficit, or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit. The sum of such amounts shall be credited to the United States.

"(f) If the sum of the amounts so credited to the

carrier under subdivision (d) exceeds the sum of the amounts so credited to the United States under subdivision (e), the difference shall be payable to the carrier. In the case of a carrier which operated its railroad or system of transportation for less than a year during, or for none of, the test period, the foregoing computations shall not be used, but there shall be payable to such carrier its deficit in railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation.

"(g) The Commission shall promptly certify to the Secretary of the Treasury the several amounts payable to carriers under paragraph (f). The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated." (Feb. 28, 1920, C. 91, Sec. 204, 41 Stat. 460, 49 U.S.C.A., Sec. 73.)

Amendment to the Transportation Act of 1920 (enacted February 26, 1921):

"Sec. 212. (a) In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn

pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) If for a payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

"(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement." (Feb. 26, 1921, c. 72, 41 Stat. 1145, 49 U.S.C.A. Sec. 79.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 768

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF OF PETITIONER, BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, A CORPORATION, ON THE MERITS.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit, rendered on November 7th, 1932, is reported at 61 Federal (2d) page 587, and is printed in the record at pages 82 to 94, inclusive.

The opinion of the District Court for the District of Montana, overruling demurrer to complaint, rendered on February 26th, 1930, is reported at 38 Federal (2d) page 871, and is printed in the record at pages 10 to 17, inclusive.

The opinion of the District Court for the District of

Montana, on demurrer to answer, rendered on May 31st, 1930, is printed in the record at pages 37 to 40, inclusive.

The decision of the Interstate Commerce Commission certifying petitioner's claim is reported in 94 I. C. C. 617, and the decision of the Commission vacating and setting aside petitioner's certificate is reported in 117 I. C. C. 780.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925 (C. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A., Section 347 (a)).

2. The date of the judgment to be reviewed is November 7th, 1932 (R. 95). Petition for rehearing was filed with the Clerk of the Circuit Court of Appeals for the Ninth Circuit on December 6th, 1932, and within thirty (30) days after the judgment was rendered, as provided by Rule 29 of the Rules of the Circuit Court of Appeals for the Ninth Circuit, and the petition for rehearing was denied on January 16th, 1933 (R. 96).

3. Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit was granted on April 17th, 1933 (R. 101).

III.

STATEMENT OF THE CASE.

The petitioner is a shortline carrier whose road was in the possession and control of the United States and operated by the Director General of Railroads from Janu-

ary 1st, 1918, to September 27th, 1918, when it was relinquished, and thereafter, throughout the remainder of the period of Federal control, it was operated by the petitioner.

In a proceeding before the Interstate Commerce Commission, under the provisions of Sections 204 and 212 of the Transportation Act of 1920, entitled "Reimbursement of Deficits During Federal Control" (Appendix hereto, page 22), petitioner filed its return with the Commission showing a net credit of $600,527.35.

Thereafter, the Commission determined the amount due petitioner to be $487,116.31, and that amount was offered to the petitioner on condition that it sign a release accepting said amount "in settlement of all claims against the government under said Section 204" (R. 44-46). See *Deficit Settlement with Butte, Anaconda & Pacific Railway*, 94 I. C. C. 617; decided March 20th, 1925 (R. 47-49). This amount was certified to the Treasurer of the United States and paid in full to petitioner on March 26th, 1925 (R. 26). The Commission made this award and settlement in accordance with the interpretation of Section 204 in *Construction of the Word "Deficit"*, 66 I. C. C. 765, decided February 9th, 1922. The Commission later, after a change in its personnel, reconsidered its said interpretation of Section 204 in the case of *Deficit Status of Bingham & Garfield Railway Co.*, 99 I. C. C. 724, decided October 17th, 1925, and thereafter attempted to reverse its decision and award and rescind its settlement with petitioner, over objection of petitioner, appearing specially, that it had no power to do so. (*Deficit Settlement with Butte, Anaconda & Pacific Railway*, 117 I. C. C. 780, decided March 7th, 1927.) On the 8th day of June, 1928, repayment was demanded by the Secretary of the Treasury of petitioner and refused (R. 6).

On August 23rd, 1929, the Government commenced this proceeding, by complaint as for money had and received, to recover said sum of $487,116.31, together with lawful interest from demand, and costs (R. 2), alleging in substance the various proceedings had as above outlined. The gist of the action is that the construction placed by the Commission upon the word "deficit" (66 I. C. C. 765) was an erroneous and unwarranted construction and not in harmony with the accepted use of said word or of its use as found elsewhere in said Transportation Act (R. 5). Demurrer was filed to said complaint (R. 8), which was overruled by the District Court (R.9), (38 Fed. (2d) 871), after which answer (R. 17), demurrer thereto (R. 34), overruled in part and sustained in part by the District Court (R. 37), and amended answer (containing affirmative defenses, first, compromise and settlement hereinbefore mentioned, second, certain equities in favor of the petitioner, and third, change in personnel of the Commission between the dates of its interpretations of Section 204 hereinbefore mentioned) (R. 40), were filed. Motion for judgment on the pleadings by the Government (R. 57) was granted by the District Court (R. 58), and judgment entered thereon (R. 60). Thereafter an appeal was allowed to the Circuit Court of Appeals for the Ninth Circuit (R. 66), and, on appeal, the judgment of the District Court was affirmed (R. 95). (Opinion, R. 82-94, 61 Fed. (2d) 587.) Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit was granted by this Court on April 17th, 1933 (R. 101).

The pleadings show that the petitioner, after having been relinquished by the Director General, sustained a deficit in railway operating income in its own operations during the Federal control period as compared with its test period operations, but that its railway operating in-

come exceeded its railway operating expenses during the Federal control period.

The Circuit Court of Appeals determined that the petitioner did not come within the terms of Section 204, subdivision (a), defining carriers, standing alone, or construed in connection with the other subdivisions of Section 204, because it did not, on the face of the pleadings, sustain a loss in its railway operating income during the Federal control period, although it suffered a decrease of $487,116.31 therein, as compared to the test period, that the decision of the Interstate Commerce Commission was not final and binding on the court, that there were no equities in favor of petitioner, and that no binding compromise or settlement was effected.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in affirming the order of the District Court overruling petitioner's demurrer to the complaint of the United States of America.

2. The Circuit Court of Appeals erred in affirming the order of the District Court sustaining the motion of the United States of America for judgment on the pleadings and ordering judgment in favor of the United States of America, and against the petitioner.

3. The Circuit Court of Appeals erred in finding and holding that there was no error in the judgment of the District Court entitling petitioner to a reversal, and in affirming said judgment.

V.

FEDERAL STATUTE INVOLVED.

This case involves the construction of Sections 204 (Feb. 28, 1920, C. 91, Sec. 204, 41 Stat. 460, 49 U. S. C. A. Sec. 73.) and 212 (Feb. 26, 1921, C. 72, 41 Stat. 1145, 49 U. S. C. A. Sec. 79.) of the Transportation Act of 1920, set out in the appendix hereto on pages 22 and 32.

VI.

SUMMARY OF ARGUMENT.

1. That the construction of Section 204 by the Interstate Commerce Commission by virtue of which petitioner was reimbursed was and is correct as carrying out the intention of the Congress and as a liberal interpretation of the Transportation Act, declared to be remedial by this Court. The phrase in subdivision (a) of Section 204, defines a carrier within the section as one which "sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation". This definition must include a carrier which sustained a decrease or falling off in railway operating income during the Federal control period as compared to the railway operating income during the test period because; (a) it is the correct definition of the word "deficit" itself; (b) it accords with the intent of the Congress as shown by the Congressional Record; (c) it remedies the known mischief, which was actual loss of income to petitioner and other railroads similarly situated on account of diversion of traffic and other disabilities under which they labored during the Federal control period; (d) it accords with the history of this and similar acts relating to railroads dur-

ing the war period and subsequent thereto; and, (e) because any other construction would result in discrimination and injustice.

2. That Sections 204 and 212, assuming but not conceding an erroneous and unwarranted construction thereof, which included petitioner, vest the Interstate Commerce Commission with sole, exclusive and non-recurrent power and discretion to determine the right of the petitioner (and other railroads similarly situated) to reimbursement thereunder, which required on the part of the Commission an interpretation of the law and a determination of the facts. The exercise of this jurisdiction was not an exertion of the power delegated to the Interstate Commerce Commission as such.

3. That the determination of the Interstate Commerce Commission under Sections 204 and 212 in including petitioner within the terms thereof, assuming but not conceding the same to be erroneous and unwarranted, was and is final and conclusive, binding alike upon the United States, the petitioner, the Commission, and the courts, in the absence of provision by Act of Congress for appeal or review, so that the decision of the Commission cannot be re-opened, reviewed, reversed or set aside in this or any other proceeding.

4. The Interstate Commerce Commission had no power to rescind and set aside its award of reimbursement—*A fortiori*, it has no such power after its personnel had been changed.

5. That the reimbursement, paid to petitioner in accordance with Section 204, was not a payment for which the Government had received nothing in exchange. It was

a reimbursement for decrease in railway operating income sustained by it by reason of government operation of railroads during the war period, particularly in view of the fact that it has been held to be taxable income by this Court. The money *ex aequo et bono* belongs to petitioner.

6. That the payment of the money to petitioner under Section 204 was the result of a compromise and settlement, and cannot be recovered back by the Government.

VII.

ARGUMENT.

Since this case was decided on the pleadings, to wit, the demurrer to the complaint and the motion for judgment on the pleadings after amended answer filed, the specification of errors is necessarily general. However, the questions presented are raised by the rulings on demurrer and motion for judgment on the pleadings and entry of judgment. The correctness of the decision of the Circuit Court of Appeals for the Ninth Circuit is determinative of this case. It is respectfully submitted that the decision was and is incorrect, that error was committed, as hereinafter shown, and that the judgment should be reversed.

1. THE CIRCUIT COURT OF APPEALS ERRED IN HOLDNG THAT SECTION 204, SUBDIVISION (A), OF THE TRANSPORTATION ACT OF 1920, DOES NOT INCLUDE PETITIONER WITHIN ITS TERMS.

Petitioner was one of the railroads entitled to be reimbursed under Section 204.

In addition to the other requirements of subdivision (a) of Section 204 (Appendix 22), all of which are conceded, it "sustained a deficit in its railway operating in-

come for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation."

This phrase must be held to mean a decrease or falling off in railway operating income, and not a "red ink" figure because; (a) it is the correct definition of the word "deficit" itself; (b) it accords with the intent of the Congress as shown by the Congressional Record; (c) it remedies the known mischief, which was actual loss of income to petitioner and other railroads similarly situated on account of diversion of traffic and other disabilities under which they labored during the Federal control period; (d) it accords with the history of this and similar acts relating to railroads during the war period and subsequent thereto; and, (e) because any other construction would result in discrimination and injustice.

It is appropriate to detail briefly the causes and circumstances leading up to, and the reasons for, the adoption of Section 204, as well as the history surrounding its passage.

This Court has recognized the propriety thereof, in dealing with Sections 209 (Appendix 25) and 212 (a) (Appendix 32), found in that portion of the Transportation Act of 1920 (Appendix 21) in which Section 204 is found, in the following language:

> "Thus far we have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute. In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress. United States *v.* Missouri Pacific Railroad Co., 278 U. S. 269, 278, 49 S. Ct. 133, 73 L. Ed. 322."

United States *vs.* Great Northern Railway Company, 287 U. S. 144, 53 S. Ct. 28, 32.

We have, therefore, included in the Appendix, under separate cover, for convenient reference, the parts deemed material, of the legislation under which the President took possession of the railroads December 28, 1917; of his proclamation and statement in that regard; of the Federal Control Act adopted in 1918; of the Transportation Act adopted in 1920; and of the general facts and circumstances and the legislative history surrounding the adoption of the Transportation Act.

By joint resolutions of Congress in 1917, a state of war was declared to exist between the United States and other countries, and the President was empowered in time of war by an act of Congress, approved August 29, 1916, (Appendix 1) to take possession and assume control of the railroads. In pursuance thereof, the President, by proclamation bearing date December 26, 1917 (Appendix 2), did take possession and control on December 28, 1917, of *all* railroads within the continental United States, and an individual designated in said proclamation as Director General of Railroads was empowered and directed to enter upon negotiations with the owners thereof *"looking to agreements for just and reasonable compensation for the possession, use and control of their respective properties on the basis of an annual guaranteed compensation * * * equivalent as nearly as may be to the average of the net operating income thereof for the three-year period ending June 30, 1917."* (Italics ours.) (Appendix 3.)

Following this, possession was taken of all railroads, including petitioner's. On March 21, 1918, the "Federal Control Act" (Appendix 6) was passed, by which the President was *"authorized to agree with and to guarantee to any such carrier* (under Federal control) * * * *as*

just compensation an annual sum payable from time to time in reasonable installments for each year and pro rata for any fractional year of such Federal control not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.'' (Italics ours.) (Appendix 6.)

The Act further provided, for the three-year period ended June 30, 1917, that the *''average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.''* (Italics ours.) (Appendix 7.)

The Act also provided that, if during the three-year period ended June 30, 1917, because of non-operation or for some equally compelling reason "so exceptional as to make the basis of earnings hereinbefore provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just." (Appendix 9.)

Federal control of railroads continued uninterrupted from December 28, 1917, to February 29, 1920, on which latter date, by virtue of the Transportation Act, 1920 (Appendix 21), all railroads then remaining under Federal control were relinquished. Shortly after the passage of the Federal Control Act many railroads were relinquished by the Director General from Federal control, and left to shift for themselves. The petitioner was so relinquished September 27, 1918. *Had it remained under Federal control, it would have received the same amount as it subsequently received under Section 204.*

The President's proclamation and notice, the Federal Control Act, the Transportation Act, 1920, and the investigations had and the action taken by Congress in regard thereto and in the passage of such legislation disclose:

1. That there was a necessity for taking the railroads into Federal possession and control, and for the operation thereof as a federally unified system of transportation. (Appendix 2, 4, 39.)

2. That the owners of the railroads were entitled to just compensation for such Federal taking and use of their railway properties. (Appendix 4, 5.)

3. That the "test period", being the three years ended June 30, 1917, was considered as a fair and reasonable period of railroad operation to use as a basis for measuring the damages resulting to railroads during Federal control, except as to those railroads whose operations during said test period, as defined by the Act, were such that the test period could not fairly be used for such a basis. (Appendix, 9, 24.)

4. That the test period used was considered fair, because in one year thereof operations resulted in a poor year, and in two years operations resulted in good years, for the railroads, and the three years averaged together produced a fair basis and yielded an average annual return to the railroads on book value of 5.32 per cent. (Appendix 99, 100.)

5. That the standard of compensation paid the railroads retained under Federal control was measured by the railroads' respective test period operations. (Appendix 7, 33, 82.)

6. That many railroads (including petitioner's) which competed for traffic or connected with federally controlled

and operated railroads were relinquished from Federal control and operation in 1918. (Appendix 35, 63, 76.)

7. That the Director General of Railroads during the period of Federal control and operation fixed scales of wages, controlled, routed and diverted traffic, fixed divisions, and did other things, the effect of which was to seriously impair and damage the released railroads; the damage so sustained was a direct consequence of Federal control and operation. Such released railroads had to meet the wage scales fixed by the Director General or lose their employees. They suffered from the Federal control, diversion and routing of freight, and from other causes. (Appendix 35, 63-65, 76.)

8. That Congress realized the injustice being done and the damage inflicted upon such released railroads, and attempted to rectify the situation by placing such released railroads, so far as compensation was concerned, in the same position as federally controlled and operated railroads, but the President vetoed such Congressional action. (Appendix 63-65, 74, 89-93.)

9. That the railroads operated under Federal control, as a whole, had railway operating revenues in excess of railway operating expenses; they had railway operating incomes. These railway operating incomes in many months of Federal control were insufficient to meet the "test period" compensation required to be paid them; in some months there was a surplus. Whenever railway operating income was insufficient to meet "test period" obligations, such lack, insufficiency or deficiency in railway operating income was known and so regarded as a deficit in railway operating income in relation to "test period" requirements. (Appendix 36-39, 59, 67-68, 81-86.)

10. That the Transportation Act, 1920, including Sections 204 and 209, was passed after Congress had given many months' consideration thereto and to all the questions involved therein. (Appendix 89.)

11. That in the adoption of Section 204, Congress again recognized injustice had been done, injury had resulted, and damage had been sustained to previously released railroads by reason of Federal control. Congress considered that railroads which had railway operating incomes during private operation in the Federal control period, *less* than their railway operating incomes in the test period, were in the same category as released railroads that operated in the test period, which had railway operating revenues in the Federal control period insufficient to meet railway operating expenses. (Appendix 49-53, 73, 74.)

12. In the passage of the "guaranty section" (209), Congress recognized that all railroads, those released by the Transportation Act, as well as those previously released, would be affected, impaired and damaged as a result of the ending of Federal control, so Congress fixed the same basis of compensation for six months from March 1, 1920, as to railroads then and previously released, as the compensation based on "test period" operations, when the Federal Control Act was adopted. (Appendix 35, 38, 53, 93.)

13. That Congress applied to the latter portion of subdivision (f), section 204 (Appendix 24), substantially the same principle of classification it had applied to railroads in the adoption of the Federal Control Act (Appendix 9), the reason being, in each instance, that lack of operation in the "test period" would afford no *criteria* for ascertaining the damage sustained by railroads so situated.

14. *That Congress adopted and adhered to a general policy and purpose of uniformity and equality with respect*

to all railroads with sufficient test period operations, which operated under or competed for traffic or connected with a railroad operated under Federal control when it passed the various statutes in question. It fixed a uniform basis for payment to such railroads in the nature of compensation as measured by test period operations; this uniform basis was carried through the Federal Control Act; through the Act of Congress of June 29, 1918, vetoed by the President; through Section 204 and Section 209 of the Transportation Act, 1920.

a. In construing Section 204, the Circuit Court of Appeals erred in not giving to the word "deficit" its accepted use and meaning.

In adopting Section 204, subdivision (a), Congress defined carrier to mean, among other things, "one which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad." (Appendix 22.)

The natural import of the phrase "deficit in its railway operating income" as used in subdivision (a), Section 204, which subdivision (a) defines the term "test period", clearly indicates a decrease in railway operating income during the Federal control period as compared with the test period.

The word "deficit", as it has been variously defined by lexicographers, ordinarily means "deficiency, or something wanting, as a failure or falling off in amount, specifically a financial deficiency, as a deficit in taxes or revenue."

"DEFICIT. A deficiency or falling short in amount (Latin: it is wanting). *Deficiency* is the state of being deficient. Lack, insufficiency, incompleteness, e. g., a deficiency in blood. *Deficient*, lacking, insufficient; not hav-

ing an adequate or proper supply or amount, e. g., the regiment was deficient in arms."

Funk & Wagnalls' New Standard Dictionary.

"DEFICIT. (Latin: it is wanting). The deficiency which is discovered in the accounts of an accountant, or in the money which he has received."

Bouvier's Law Dictionary.

"DEFICIT. Something wanting, generally in the accounts of one intrusted with money, or in the money received by him."

Black's Law Dictionary.

"DEFICIT. (Latin: *deficit*, it is wanting, 3rd per. sing. pres. ind. of *deficere*, be wanting; see deficient.) A failure or falling off in amount; specifically, a financial deficiency; as a deficit in taxes or revenue.

"DEFICIENCY. (Latin: *deficen* (t)—a deficient; see deficient.) The state of being deficient; a lack or failing; a falling short, incompleteness, as of intelligence, attainments or performance.

"DEFICIENT. (Latin: *deficien* (t—)s ppr. of deficere, lack, fail, be wanting.)

(1) Lacking, wanting, incomplete.

(2) Defective, imperfect, inadequate.

(3) Not having a full or adequate supply; as the country is deficient in the means of carrying on wars."

The Century Dictionary.

"DEFICIT. Want, deficiency in an account or number as a deficit in the taxes or revenues."

18 Corpus Juris, 465.

"DEFICIENCY. The lack of a part; shortage or insufficiency."

18 Corpus Juris, 465.

In *Early Foster Co.* v. *Gottlieb*, 214 S. W. (Tex.) 520, the Court construed a rule of a grain dealers' association, incorporated by reference in a contract, and said (522):

> "In its plain and ordinary meaning, the word 'deficit' implies a deficiency, and as here used clearly means a deficiency in the quantity or a failure of the seller to ship a portion of the products contracted to be delivered."

In *Mutual Loan & Bldg. Assn.* v. *Price*, 19 Fla. 127, 137, the Court defines "deficit" by stating:

> "Worcester gives its meaning as 'want, deficiency in an account or a number', Johnson gives its meaning as 'want, deficiency'. And Webster defines it as 'want, deficiency, as a deficit in the taxes or revenue'."

In the case of *In Re Village of Plattsburg*, 50 N. Y. Supp. 356, 361; 27 N. Y. App. Div. 353, 360, a "deficiency" is defined to be *"the lack of a part"*.

Hence the clause in Sec. 204, subdivision (a) "and which sustained a deficit in its railway operating income", giving the words their natural and ordinary meaning, necessarily implies a railroad "which sustained a deficit (or deficiency or the lack of a part) in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad * * *." And this natural and ordinary meaning is consistent with the legislative intent, as will be shown.

The term "railway operating income" has been judicially defined; its meaning is well known.

"It embraces the results of railway operation, as distinguished from income from other sources, and is not gross 'operating revenue', but such revenue decreased by 'operating expenses'."

Westbrook *v.* Director General, 263 Fed. 211.

Since the primary meaning is "decrease" or "falling off," we have a phrase when "deficit" is coupled with "railway operating income," whose natural and primary import is a decrease or falling off in amount of railway operating income. This presupposes a standard of comparison showing that a falling off in railway operating income means a decrease as compared with some other yardstick of measurement, and when used here in respect of the portion of Federal control during which petitioner operated its own railroad, that standard must be some other period by which the decrease or falling off in railway operating income is to be measured.

There is but one comparative period, and that is the test period referred to in the same subdivision (a), which is defined: "The term 'test period' means the three years ending June 30, 1917." (Appendix 23.)

It follows that the natural meaning of the phrase "deficit in its railway operating income," as used in subdivision (a) of Section 204, means a *decrease* in railway operating income in the Federal control period as compared with the railway operating income in the test period.

There is nothing in the words themselves which justifies, much less compels, the construction last adopted by the Interstate Commerce Commission, since the words themselves negative such a construction. This construction is to the effect that "deficit" means the amount by which railway operating expenses exceed railway operating revenues.

To justify the decisions of the lower courts herein, the clause in question must be construed as an absence of railway operating income.

Throughout the Section, notably in subdivisions (b), (c), (d) and (e), is a recurrence of the word "deficit". In these instances the word "deficit" is used in a *restricted accounting sense,* defining railway operating revenues as being something less than railway operating expenses. The difficulty confronting the Interstate Commerce Commission when it last dealt with the meaning of the word deficit lies in the fact, that because "deficit" is used in the parts of Section 204 with a restricted accounting meaning, therefore that restricted accounting meaning must of necessity extend to and be applied to the word "deficit" as used in the definitive subdivision (a), when it is manifest from the text of the definitive subdivision (a) and the obvious purpose and meaning of the subsequent granting subdivisions of Section 204 that any railroad whose private operations in the Federal control period were less than its operations in the corresponding test period was to receive the benefits of the Act and be compensated in damages to the extent of such difference.

In subdivision (d) it is said "For every month of the period of Federal control during which the railroad * * * was not under Federal operation the Commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, * * * (3) the sum of its Federal control return if a deficit, plus its test period return, if an income." (Appendix 24.)

By subdivision (e) it is further provided "For every such month the Commission shall then ascertain * * * (2) the difference between its test period return, if a deficit, and its Federal control return, if a smaller deficit,

or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit." (Appendix 24.)

By subdivision (f) it is then further provided that if the sum of the amounts so credited to the carrier under subdivision (d) exceeds the amounts credited to the United States under subdivision (e), the difference shall be payable to the carrier. (Appendix 24.)

Manifestly, "deficit" as thus used in subdivisions (d) and (e) is used antithetically, in a restricted and technical accounting sense, and means that the carrier either in months in the test period or in the Federal control period had railway operating expenses in excess of railway operating revenues.

Subdivisions (d) and (e) contain other provisions. Subdivision (d) provides that "For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the Commission shall then ascertain * * * (2) the difference between its test period return, *if an income,* and its Federal control return, *if a smaller income* * * *. The sum of such amounts shall be credited to the carrier." (Appendix 24.) Similarly subdivision (e) provides that "For every month the Commission shall then ascertain (1) the difference between the carrier's Federal control return, *if an income,* and its test period return, *if a smaller income,* * * *. The sum of such amounts shall be credited to the United States." (Appendix 24.)

Subdivision (f) applies to the situation contemplated by subdivision (d), clause (2), and by subdivision (e), clause (1), with the same force that it applies to the other clauses therein, and as already indicated, subdivision (f) affirmatively directs that "if the sum of the amounts so credited to the carrier under subdivision (d) exceeds the

sum of the amounts so credited to the United States under subdivision (e), the difference shall be payable to the carrier." (Appendix 24.)

These provisions of subdivisions (d) and (e), however, only apply where the railroad in question has been operated for a year or longer in the test period. Where a railroad was operated for less than a year, or not at all, in the test period, a different rule is prescribed, for the apparent and obvious reason that, since there was so short an operation in the test period or none at all, there would be no reasonable yardstick with which to compare operations. In the absence of such a yardstick, a reasonable classification is prescribed by subdivision (f) which in effect provides that where railway operating revenues are exceeded by railway operating expenses, the difference shall be payable to such a carrier. (Appendix 24.)

Section 204 should be construed so as to bring within its remedial provisions, all railroads released from Federal control and operated privately during a portion thereof, which competed for traffic, or connected with a railroad under Federal control, and operated for more than a year in the test period, and which, under private operation during Federal control (as a whole) sustained *a loss,* by comparison with their operations in the corresponding portion of the test period.

That this construction is correct is borne out from the fact that Section 204 (f) provides that if the amounts credited to the carrier under Section 204 (d) exceed the amounts credited to the United States under Section 204 (e) the difference shall be payable to the carrier.

The provisions of Section 204 (c), (d), (e), (f) and (g) are mandatory; they require and compel the action there contemplated; and if there is a loss to the carrier in the control period by comparison with the test period, that loss

"shall be payable to the carrier". Congress, when it adopted these provisions, followed the same policy for reimbursement inaugurated by the Federal Control Act.

Moreover, Section 204 bears the official title "Reimbursement of Deficits During Federal Control". (Appendix 22.) If the word "deficits" in this title is construed in its technical accounting sense, the title would not be descriptive of the subject matter. The Section makes provision for reimbursement, not of the short line carrier's deficit sustained under private operation in the Federal control period, but of the decrease or loss in railway operating income during the period of private operation as compared with the corresponding test period railway operating income.

Clearly the word "deficits" as used in the title means the difference between the railway operating income in the test period and the railway operating income in the control period. If the word "deficit" as used in Section 204 (a) means a "red ink" figure, it has a different meaning than the word "deficits" as used by the Congress in the title.

In *United States* v. *Katz*, 271 U. S. 354, 357, this Court, with respect to the legislative purpose, said:

> "In ascertaining that purpose we may examine the title, * * *."

To the same effect:

> Knowlton *v.* Moore, 178 U. S. 41, 65.

Such a construction makes the title descriptive of the subject matter and gives meaning to every word, clause, phrase and subdivision of Section 204.

As was said by this Court in *Costanzo* v. *Tillinghast*, 287 U. S. 329, 53 Sup. Ct. 152, 153: "We must look to the

whole of the section, in order not to give undue effect to particular words or clauses, * * *."

In this connection the District Court held (R. 14):

> "It may be that the term in Par. a, 'deficit in its railway operating income,' *is inaccurate to express the idea of outlay exceeding income or a red balance;* but Congress having so used it some half score other places in the Act must be taken to have likewise used it in Par. a; no different intent clearly appearing." (Italics ours.)

It was apparent the District Court regarded that "deficit in its railway operating income" as used in subdivision (a), without regard to the other parts of the Section and applying to the word "deficit" its general meaning, meant precisely what we have above urged, *viz.*, a decrease or falling off in its railway operating income as compared with the test period. If this were not so, the District Court would not have used the expression *"inaccurate to express the idea of outlay exceeding income."* (R. 14.) The District Court, however, although subdivision (a) is one of definition, restricted the meaning of the word "deficit" as there used, to its technical accounting sense, simply for the reason that the word as elsewhere used was used in a strictly accounting sense.

The Circuit Court of Appeals, sustaining the District Court, narrowed the construction of subdivision (a) of Section 204 to exclude petitioner, intimating that such narrowed construction was admitted (whereas petitioner had strenuously argued otherwise), in the following language:

> "It seems to be admitted that the terms of subdivision (a) of Section 204, taken alone, entitles a carrier to compensation only when it operated at a loss during the control period." (R. 89.)

Whereas, this Court, in the case of *Continental Tie and Lumber Co.* vs. *United States,* 286 U. S. 290, 293, decided May 16th, 1932, had before it the question whether payments made under Section 204 were income, and held that:

> "* * * This section provided for such an award and payment to a railroad which during any part of the period of Federal control competed for traffic, or connected, with one under Federal control, and sustained a deficit in operating income for that portion of the period during which it operated its own railroad. *The act directed the Commission to compare the results of such operation with those of the test period, defined as the three years ending June 30, 1917; and, if less favorable during the period of Federal control than during the test period, to award an amount calculated as prescribed by the section.* The Commission made an award and the Secretary of the Treasury paid the Railway." (Italics ours.)

This statement of the Supreme Court clearly shows that if the operation was less favorable during the period of Federal control than during the test period, the railroad should be awarded the difference. The words "less favorable" do not import a loss but merely a decrease.

It is true that in the *Continental Tie case* (286 U. S. 290), the railroad involved was a "red ink" railroad, as hereinabove denominated. Nevertheless the scope of the opinion of the Supreme Court is broad enough to include the petitioner within the terms of subdivision (a) of Section 204.

The same construction was placed on the words "deficit in railway operating income" in the case of *United States ex rel. Cripple Creek & Colorado Springs Railroad* v. *Interstate Commerce Commission,* 11 Fed. (2d) 554, 555. (Certiorari denied, 273 U. S. 706.)

The Circuit Court of Appeals seems to have assumed that the narrower definition of "deficit" and "deficit in railway operating income" should be applied because the same word and the same phrase were used in a restricted sense elsewhere.

The fact that Congress used the same word, or the same phrase, in two different sections or subdivisions of the same act is not at all conclusive that such word or phrase meant the same in each. This Court dealt with this question in its opinion in the case of *Atlantic Cleaners & Dyers* v. *United States*, decided May 23, 1932, 286 U. S. 427, 432, 433, wherein the Sherman Anti-Trust Act was under consideration. This Court said:

> "The words describing the activity declared to be illegal are the same in both sections, namely, 'restraint of trade or commerce.' The contention on behalf of appellants is that the words, being identical, should receive the same construction in section 3 as in the preceding section 1; * * * It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance."

To the same effect:

> Interstate Commerce Commission *vs.* Alabama Midland Ry. Co., 168 U. S. 144, 166.

The correctness of petitioner's position in connection with the construction of Section 204 was denied, as indicated above, by the District Court and the Circuit Court of Appeals, on what we consider inconsistent grounds.

When petitioner contended that Section 204 (a) includes

petitioner within its terms, it was held that this subdivision cannot be construed without reference to the use of the phrase "deficit in its railway operating income" in other subdivisions of Section 204, and elsewhere in the Act.

When petitioner contended that, when Section 204 (a) is read in connection with the other mandatory subdivisions of the same Section, and the title, the Section becomes harmonious and each word, phrase and clause is given effect, it was held that Section 204 (a) defines the carrier entitled to the reimbursement under the Act and that its scope cannot be enlarged by anything found elsewhere in Section 204.

We believe that failure to realize this inconsistency resulted in the adoption of the incorrect construction of Section 204 by both the District Court and the Circuit Court of Appeals.

b. In construing Section 204, effect should have been given to the intent of Congress as shown by the Congressional Record.

In the consideration of these matters by the Congress the word "deficit" was constantly used as the difference between the test period income and the Federal control period income, without any relation as to whether or not the Federal control period income showed a "red ink" figure or otherwise.

We quote briefly from the Congressional Record, Volume 59, Part 1, page 727, December 17, 1919, which quotation appears in the appendix hereto at pages 82 to 84, as follows:

> "Mr. Pomerene. The Senator, I think, was not in the Chamber when I began my discussion of the matter. These are figures furnished to me by the Inter-

state Commerce Commission. They get monthly reports. The test period was for 1915, 1916, and 1917. As they take the reports for January, let us say, for each of those years they average them and this average makes up the compensation which the Government is to pay the railroads for the month of January during the period of Government control.

Let me take the month of June. The net railway operating income for the month of June was $52,200,000, the standard return guaranteed $83,400,000, the deficit $31,200,000.

In July the net railway operating income was $77,100,000, the standard return guaranteed $75,600,000, so that for the first time in any month of the year we have a surplus of $1,500,000.

In August the net operating income was $92,000,000, the standard return guaranteed $87,600,000, and again there is a surplus of $4,700,000.

In September the net railway operating income was $77,700,000, the standard return guaranteed $92,100,000, and again there is a deficit of $14,300,000.

In October the net railway operating income was $76,300,000, the standard return guaranteed $95,100,000, and again there is a deficit of $18,800,000.

So that during the ten months the total net railway operating income was, in round numbers, $481,000,000, and the standard return guaranteed for those months $748,000,000, and the deficit for the ten months is $267,000,000.

The tabulated statement referred to and which was furnished by Hon. George B. McGinty, secretary of the Interstate Commerce Commission, is as follows:

Net railway operating income of large roads in the United States by months in calendar year 1919, in

comparison with the standard return under the Federal Control Act.

Month	Net Railway operating Income 1919	Standard Return Guaranteed	Surplus or Deficit
January	$18,783,702	$55,442,674	**$36,658,972
February	10,106,268	46,493,912	** 36,387,644
March	10,842,608	67,738,212	** 56,895,604
April	26,115,214	67,102,681	** 40,987,467
May	39,462,367	77,729,962	** 38,267,595
June	52,270,702	83,444,790	** 31,174,088
July	77,176,933	75,650,613	*** 1,526,320
August	92,396,635	87,681,468	*** 4,715,168
September	77,763,023	92,122,874	** 14,359,851
October	76,397,213	95,123,649	** 18,726,436
Ten months ending with October	*481,082,531	748,530,835	*267,448,304

*Includes some corrections made in monthly returns as published.
**Deficit.
***Surplus.

Now, let us analyze these figures a little further. The computations which I now give were made by the clerks in my office. They are simple and correct.

Senators will remember from the figures I have given that in 8 of the 10 months there was a deficit. The total deficit for the 8 months was $273,457,657. There were two months in which there was a surplus, July and August, amounting for the two months to $6,241,488. The average deficit for the eight months was $34,182,207.12, and the average surplus for the two months was $3,120,744. The net deficit for the

10 months was $267,216,169. The net deficit for each of the ten months was $26,721,616.90. The total standard return guaranteed for the ten months was $748,530,835, and the total standard return for 1 month on the average is $74,853,083.50."

Again, in the House Record, November 12, 1919, Volume 58, Part 8, page 8395 (Appendix 38, 39), we find Mr. Sims, a member of the Committee reporting the bill, using the following language with reference to the use of the word "deficit" as understood by the Congress and in connection specifically with Mr. Madden's proposed amendment to repeal the Act authorizing the President in time of war to take possession and assume control of any system of transportation, or part thereof, and utilize the same:

"Mr. Chairman, I rise in opposition to the amendment. Gentlemen, there is no use now in using language that misleads or deceives anybody or is likely to do it. Now, let us look the question fairly and squarely in the face. When we use the word 'deficits' in ordinary use, it means a deficit in expenses of operation; that is, that the railroad has not paid its way. Now, the meaning of deficit referred to here is that the Government lacked that much of having made operating expenses and the rental due the roads. * * * And the deficit was not a deficit at all in the ordinary sense. We lost on our rental contracts. That is all there is of it. Talking about the deficit in the first year means that we did not make the rent contract in addition to expenses of operation."

Again, in the House, Mr. Esch, *one of the managers in charge, in introducing the conference bill*, said:

"We take care of them in the matter of consolidations, and also allow them 100 per cent. compensa-

tion under the Federal Control Act. We also take care of them in the matter of loans to carriers. I think on the whole the short line roads have been treated fairly and possibly generously treated, but unless they are fairly and generously treated, the trunk line itself may suffer, because the short line is the feeder for the trunk line, and it is as necessary to the people living thereon as is the trunk line to the people it serves." (Appendix 55.)

Additional matters showing the intent and purpose of the Congress are set out in the appendix beginning on page 33.

c. By reason of the known mischief to be remedied, which was actual decrease of income to petitioner and other railroads similarly situated on account of diversion of traffic and other disabilities under which they labored during the Federal control period, Section 204 should have received in any event a liberal construction.

The known mischief to be remedied was clearly recognized and determined by this Court in the following language in declaring the purpose of Congress in the enactment of Section 204:

"* * * By the terms of section 204 payment was to be made to railroads not under federal control of a proportion of any operating deficit suffered in the period of such control. The underlying purpose of Congress was the same in both cases. Railroads falling within section 204 were principally short lines. They were known to have suffered serious losses in income due to routing arrangements and other administrative measures made necessary by government

operation of the larger railroad systems. The Transportation Act did not contemplate that the payments to be made pursuant to section 204 were in any sense just compensation for the taking of property. There was no room for such reimbursement, as the short lines were during the time to which the section applied in the possession and management of their owners. Congress, nevertheless, realized that federal operation had caused them consequential losses, at least partial redress for which was the purpose of the section where actual deficits in income had resulted. * * *"

Continental Tie & Lumber Co. *v.* United States, 286 U. S. 290, 294.

In the same case this Court determined Section 204 to mean:

"* * * The act directed the Commission to compare the results of such operation with those of the test period, defined as the three years ending June 30, 1917; and, if less favorable during the period of federal control than during the test period, to award an amount calculated as prescribed by the section. * * *"

Continental Tie & Lumber Co. *v.* United States, 286 U. S. 290, 293.

When the Federal Control Act was adopted, Senator Cummins offered an amendment thereto, which was incorporated as a part of Section 1 of the Act as follows:

"That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use and control, or which connects with such rail-

roads and is engaged as a common carrier in general transportation, shall be held and considered as within 'Federal control', as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: * * *." (Appendix 9.)

Section 14 of the Act provides that "The President may relinquish all railroads and systems of transportation under Federal control at any time he shall deem such action needful or desirable. No right to compensation shall accrue to such owners from and after the date of relinquishment for the property so relinquished." (Appendix 19.)

Notwithstanding this latter provision, it is apparent from the former, that released railroads like petitioner were still to be regarded as "necessary for the prosecution of the war * * * and entitled to the benefits of all the provisions of the Act."

Obviously, the provisions of Section 14 were not intended to apply to petitioner, although released and privately operated, since by virtue of the mandatory provisions of Section 1, petitioner was to *"be held and considered as within 'Federal control'."*

Congress must have used the word *"as"* advisedly; used it as an adverb, denoting, as the word is defined, equality or likeness in kind, quality, degree or manner.

Included with released railroads were certain ones engaged as common carriers in general transportation, such as petitioner, "not owned, controlled or operated by another carrier company * * * which * * * theretofore competed for traffic or which connected with" (Appendix 9) a railroad, the possession, use and control of which had been taken by the President.

Although railroads so described might, as many were, including petitioner, be relinquished and privately oper-

ated, they were still under the provisions of and protected by the Federal Control Act, since in terms the Act declared that such railroads "shall be held and considered *as* within Federal control" and "necessary for the prosecution of the war." (Appendix 9.)

The effect of this paragraph in Section 1 was to separate such railroads from the class of those released and denied compensation under Section 14, and as to them make a class, although relinquished, still by right entitled to compensation. They were not within the last sentence of Section 14.

Congress thus intended that but one class of railroads should not receive compensation, being those released railroads which were not owned, controlled or operated by another railroad under Federal control and which had not competed for traffic or had not connected with a railroad under Federal control, or were not engaged as common carriers in general transportation.

Here again is made manifest the policy and purpose of Congress to reimburse railroads such as petitioner.

The petitioner and railroads similarly situated, although the law required that they "shall be held and considered as within 'Federal control' * * * and entitled to the benefits of all provisions of this Act", did not receive the benefits thereof, so Congress, still following the same policy and purpose, when adopting the Transportation Act, 1920, gave the same relief to petitioner and other railroads in like situation by enacting Section 204, as it sought previously on two occasions to give; by adopting the Cummins amendment above quoted and by passing the bill vetoed by the President July 11, 1918. (Appendix 89-93.)

This Court should not adopt a construction, as did the lower courts, contrary to the obvious purpose and policy of Congress. It should adopt a construction consistent with that policy and purpose, in accordance with the rule in

Johnson v. *Southern Pacific,* 196 U. S. 1, which was based upon the Safety Appliance Act, wherein it was argued *inter alia,* that the law must be strictly construed, because the Act was penal and changed the common law as to assumption of risk.

The rule as announced in that case was (page 18):

> "I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature."

If the interpretation placed upon the purpose of the Congress in enacting Section 204 is restricted so as to cover only "red ink" carriers, it would be obviously unjust and discriminatory as to those carriers, such as petitioner, which suffered a decrease and falling off in railway operating income during the Federal control period as compared with the test period. The general rules of construc-

tion of remedial statutes and their interpretation are exemplified by this Court in a decision construing an act to quiet land titles in California, wherein this Court said that:

> "* * * Those who could not show actual grants from the Mexican Government might nevertheless have equities quite as strong in their favor as those who could show an actual grant which was defective. The act of Congress should not be so construed as to except from its remedial provisions those who were without an actual grant while at the same time filling every other requirement of the act, unless the language used therein is open to no other interpretation. * * * The purpose of the act is to quiet titles in California, and, as stated by the court below, it is a remedial statute and one entitled to a liberal construction in order to effect the purpose and object of its enactment. * * * Otherwise, it seems to us clear that the purpose for which this seventh section was passed *would be so circumscribed as to reduce it to much narrower limits than the known mischief to be remedied called for.*" (Italics ours.)

Beley *v.* Naphtaly, 169 U. S. 353, 359-361.

d. The history of this and similar acts relating to railroads during the war period and subsequent thereto is a proper aid to the correct construction of Section 204.

In *Northern Pacific Ry. Co.* v. *Interstate Commerce Commission,* 23 Fed. (2d) 221, 224 (*Certiorari* denied, 275 U. S. 572), the Court of Appeals of the District of Columbia dealt with Sections 209 and 212, Transportation Act, 1920, and in applying rules of construction, said:

> "* * * As observed in Ozawa *v.* United States, 260 U. S. 178, 194, 43 S. Ct. 65, 67 (67 L. Ed. 199): 'It

is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning, in order that the purpose may not fail.' See, also, Panama R. R. Co. *v.* Johnson, 264 U. S. 375, 390, 391, 44 S. Ct. 391, 68 L. Ed. 748."

To the same effect:

United States *v.* Great Northern Railway Company, 287 U. S. 144, 53 Sup. Ct. 28, 32.

Before considering statutes strictly in *pari materia,* attention is directed to subdivision (b), Section 204 (Appendix 23), wherein reference is made as to how railway operating income or any deficit therein shall be computed, both for the period of Federal control and for the test period. In the first situation the computation is to be made in the manner similarly provided in Section 209, Transportation Act, 1920; and in the second situation the computation is to be made as provided by Section 1 of the Federal Control Act. These two sections, therefore, are made a part of Section 204; they disclose the manifest purpose and policy of Congress to afford released railroads the same basis of compensation measured by the test period as afforded to railroads operated under Federal control by Section 1 of the Federal Control Act and afforded to *all* railroads by Section 209, Transportation Act, 1920. This rather strikingly emphasizes the purpose and intent of Congress to treat

released railroads under Section 204 precisely as railroads were treated under the Federal Control Act and Section 209, Transportation Act, 1920.

Not only are parts of Section 1 of the Federal Control Act and Section 209, Transportation Act, 1920, by reference made a part of Section 204, but such reference necessarily makes them in their entirety in *pari materia* with Section 204.

Other statutes in *pari materia* to Section 204 are the other sections of the Transportation Act, 1920, and the Federal Control Act.

Aside from reimbursements provided for by Section 204, provision was made for termination and relinquishment of Federal control (Section 200) (Appendix 22); "for adjustment and liquidation of all matters, including compensation * * * arising out of or incident to Federal Control" (Section 202); for compensation of carriers with which no control contract was made (Section 204); for guaranty in payment to all carriers for six months after March 1, 1920, of an amount equivalent to "just compensation" (Section 209); for partial and final payment certificates (Section 212).

This legislation discloses the manifest policy and purpose of Congress to deal with all carriers on or as near a basis of equality as their situations would permit, particularly as to compensation "arising out of or incident to Federal control." It discloses the same policy to carriers not under Federal control, as to those under Federal control, which during the test period had a railway operating income, in providing that all such railroads should be guaranteed for the six months' guaranty period not "less than one-half of the average annual railway operating income of such carrier during the test period"; the same policy in providing that any railway operating deficit

in the six months' guaranty period should not be greater than one-half of the average annual railway operating deficit for the test period.

Since the manifest policy and purpose of Congress was to put *all* railroads, with test period operations on the same basis of compensation for the six months' guaranty period, as railroads received during Federal control, Congress invested with the Interstate Commerce Commission the duty of ascertaining and certifying to the Treasurer of the United States the amounts payable to carriers under the six months' guaranty period.

The method of determining the guaranty in Section 209 for the guaranty period is substantially the same as the method of determining the amount due carriers under Section 204. These sections provide for remuneration on the theory of consequential losses. A carrier did not have to sustain a "red ink" deficit in the Federal control period to receive reimbursement under Section 209, and it is impossible to conceive that Congress intended under Section 204 to compensate only those short line railroads having consequential losses provided they sustained a "red ink" deficit, and intended not to compensate under Section 204 those short line railroads whose consequential losses were as great or greater, by reason of a depleted operating revenue consequent upon the same Federal activity, if they did not sustain a "red ink" deficit.

In this connection attention is directed to the dissenting report of Commissioner Esch in *Deficit Status of Bingham & Garfield Ry. Co.*, 99 I. C. C. 724. *Judicial notice will be taken of the fact that Commissioner Esch was in Congress as a member of the House of Representatives when the Transportation Act, 1920, was under preparation, consideration, debate and passage, and was one of the managers in charge of, and who introduced, the*

conference bill, and while not binding, the statement of Commissioner Esch, in his dissenting report, page 730, predicated upon his first hand knowledge as a participant in the enactment of Section 204, is persuasive:

> "From my study of Section 204 and the facts and considerations connected with its enactment, it seems clear that the purpose and intent of Congress were to reimburse carriers for losses sustained because of Federal control."

And this Court itself has held that the underlying purpose of Congress was the same in the enactment of Sections 204 and 209.

> "What we have said in Texas & Pacific Ry. Co. *v.* United States, decided this day, *ante,* p. 285, is determinative of the first contention. Section 209 of the Transportation Act guaranteed the payment of any deficiency below a fixed minimum of operating income for the six months ensuing the termination of federal control to railroads which had been taken over by the United States. By the terms of Sec. 204 payment was to be made to railroads not under federal control of a proportion of any operating deficit suffered in the period of such control. The underlying purpose of Congress was the same in both cases. * * *"
>
> Continental Tie & Lumber Co. *v.* United States, 286 U. S. 290, 293, 294.

e. Any other construction of Section 204 than that of the Interstate Commerce Commission in "Construction of the Word 'Deficit'," 66 I. C. C. 725, in accordance with which petitioner was reimbursed, results in discrimination and injustice.

The Circuit Court of Appeals herein construed the provisions of subdivision (a) of Section 204 in a narrow and restricted sense and so as to exclude therefrom and discriminate against those carriers which filled every other requirement thereof, stating that:

> "The argument that a short line having a deficit in operating income under its own operation during Federal control is given unfair advantage over roads not suffering such deficit but producing but a small income, is beside the question, for the right of Congress to define the class of carrier entitled to benefits cannot be disputed." (R. 91.)

It is not disputed that the Congress has the right to define the class of carrier entitled to the benefits of the Act, but it is the duty of a court, in construing an act of Congress, to carry out the intent of Congress, taking into consideration the circumstances under which the act was passed and the known mischief to be remedied. Aside from the obvious purpose of subdivision (f) of Section 204 solely to take care of carriers which had no test period operation and to which the previous provisions of the Section could not apply, which is a common legislative provision, the Circuit Court of Appeals did not, by its decision, above quoted, give a liberal interpretation to Section 204, as required by the decision of this Court in the case of *Piedmont & N. R. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, 311, decided May 16, 1932, wherein this Court said:

> *"The Transportation Act was remedial legislation and should therefore be given a liberal interpretation."* (Italics ours.)

As was said in *United States* v. *Fisher,* 2 Cranch 358, 400:

"So, if the literal expressions of the law would lead to absurd, unjust or inconvenient consequences, such a construction should be given as to avoid such consequences, if, from the whole purview of the law, and giving effect to the words used, it may fairly be done."

And again in *United States* v. *Kirby*, 7 Wall. 482, 486:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence."

In considering the Commission's construction, it is not inappropriate here to quote from *Hawaii* v. *Mankichi*, 190 U. S. 197, 214, where this Court has given approval to what Lord ESHER said in *Plumstead Board of Works* v. *Spackman*, L. R., 13 Q. B. D., 878, 887, as to a literal construction of a statute which would work hardship:

" 'If there are no means of avoiding such an interpretation of the statute' (as will amount to a great hardship) a judge must come to the conclusion that the legislature, by inadvertence, has committed an act of legislative injustice, but to my mind a judge ought to struggle with all the intellect that he has and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended."

The Congress in the enactment of Section 204 treated the word "deficit" and the phrase "deficit in its railway operating income" as used in subdivision (a) thereof as meaning, and intended that they should mean, the differ-

ence between the test period income and the income during the period of Federal control. To place a construction on this language which would restrict the application of the Section to railroads which suffered a loss during the period of Federal control would lead to an unreasonable and absurd result. A released railroad that sustained a loss of $1 in private operation during Federal control but which had an income of $100,000 in the corresponding test period, would be awarded $100,001 while another released road that had an income of $1 in private operation during Federal control and which had an income of $100,000 in the corresponding test period, though short $99,999 under the same circumstances, would receive nothing. Such restricted construction, leading to such unreasonable and absurd results, is contrary to the fundamentals of construction, and not in accord with the decision of this Court in the case of *Piedmont & N. R. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, wherein this Court held that the Transportation Act was remedial legislation and should therefore receive a liberal interpretation.

The rule of statutory construction above stated and applied is that a law will be so construed as to avoid injustice or discrimination.

The Circuit Court of Appeals recognized this rule in its decision, but, in the application of the rule, it arrived at an inconsistent and erroneous result. That Court first stated that (R. 90):

> "If it has not suffered a loss, it has no right to reimbursement. This construction appears to be in harmony with the purpose of Congress. If the construction that a diminution of income compared with the test period is the criterion then a discrimination would be worked against carriers of the same class

which operated for less than a year during the test period; * * *."

That Court almost immediately thereafter stated (R. 91):

> "The argument that a short line having a deficit in operating income under its own operation during Federal control is given unfair advantage over roads not suffering such deficit but producing but a small income, is beside the question, for the right of Congress to define the class of carrier entitled to benefits cannot be disputed."

It is evident from the language used by the Circuit Court of Appeals in these two quotations that in the former the Circuit Court permitted the discrimination mentioned therein to weigh in its mind in determining the intention of Congress, but, in the latter, the Circuit Court refused to give the discrimination mentioned therein any consideration at all, saying that such discrimination was beside the question, for the right of Congress to define the class of carrier entitled to benefits cannot be disputed.

The element of discrimination goes to the determination of the intent of Congress, and both of the discriminations indicated in the above quotations should at least have been taken into consideration by the Court. But the decision of the Circuit Court of Appeals is inconsistent as to the emphasis laid on the discriminations involved, and is erroneous in deciding the case without taking into consideration the discrimination against petitioner by stating that such discrimination was beside the question.

It is respectfully submitted that no better analysis of the meaning of the word "deficit" and the construction of Section 204 and the intention of Congress in enacting the same, has been made than is found in the decision of the

Interstate Commerce Commission in *Construction of the Word "Deficit"*, 66 I. C. C. 765. This decision determined the question of reimbursement to petitioner and other railroads similarly situated. It is material here, but we have refrained from quoting at length therefrom for the sake of brevity herein.

2. THE INTERSTATE COMMERCE COMMISSION WAS VESTED BY SECTIONS 204 AND 212 WITH POWER AND JURISDICTION TO INTERPRET THE LAW AND DETERMINE THE FACTS.

THE EXERCISE OF THIS JURISDICTION WAS NOT AN EXERTION OF A POWER DELEGATED TO THE INTERSTATE COMMERCE COMMISSION AS SUCH.

THE RULE IN WORK *v.* RIVES, 267 U. S. 175, SHOULD BE APPLIED HEREIN.

The Circuit Court of Appeals herein stated (R. 91) that:

> "The appellant contends that even though the Commission misconstrued the Act in allowing to the railroad the sum of money which the Government seeks to recover, that its act is not subject to review by the courts as the Commission had jurisdiction to determine the matter finally; that it acted judicially and that its first order must stand. This argument would be difficult to answer were the case one where the railroad had presented itself showing a deficit in its operating returns as compared with the test period and the dispute was as to the particular sum due to it. But, under the admitted facts, its case was not one which the Commission was authorized to consider at all."

After the conclusion of the war, the Congress, recognizing the losses suffered by and the damages done to the railroads, provided a method whereby the Government might pay its just obligations. The Congress committed the task of determining its obligations to the Interstate Commerce Commission, not as such, but as a special tribunal to hear and determine and decide all cases coming within Section 204 as well as Section 209 of the Transportation Act.

In the case of *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, 180, in considering the duties imposed upon the Interstate Commerce Commission by the Transportation Act, this Court said:

> "Congress distinguished clearly, in framing Transportation Act, 1920, between provisions which were amendments of the Interstate Commerce Act and those which, while relating to railroads, were not. The amendments were grouped under Title IV. The provisions here involved, which related solely to the termination of federal control, were grouped under Title II. Those which provided for the Railroad Labor Board under Title III. Because issuing certificates is not a part of the Commission's delegated power to regulate commerce, and is not an incident of such regulation, the special remedy provided by the Urgent Deficiencies Act is not available to review the legality or correctness of its action in doing so."

Sections 204 and 209 of the Transportation Act are found in title 2 thereof and, by the express declaration of this Court, are not amendments of the Interstate Commerce Act, and the remedies provided for the review of the legality or correctness of the Commission's action under

these Sections are not governed by the Interstate Commerce Act.

This Court further said in the same case at page 180:

> "The function imposed upon the Commission by Section 209 is solely that of determining the amount required to make good the government's guaranty. It is not an exertion of the delegated power to regulate interstate commerce. It is an incident of the World War —a temporary, non-recurrent task, which might appropriately have been performed for the Treasury by its Comptroller or auditors, or by other trusted official."
>
> Great Northern Ry. Co. *v.* United States, 277 U. S. 172, 180.

Thus the functions of the Interstate Commerce Commission in performing this particular temporary, non-recurrent task were such as might have been committed to the Secretary of the Interior or the Secretary of War, or any other official.

After the war the Government had many obligations to meet. Among other things it passed an act, known as the Dent Act, on March 2, 1919 (Chapter 94, 40 Stat. 1272, amended Nov. 23, 1921, c. 137, 42 Stat. 322), to provide relief in cases of contracts connected with the prosecution of the war, and also to provide for the payment of losses suffered by persons by reason of producing or preparing to produce manganese and other specified minerals in compliance with the request and demand of certain departments of the Government. That act is sometimes referred to as the War Minerals Relief Act. Sections 1, 2, 3 and 4 thereof provide for relief to the contractors and protection for the subcontractors. By special provision the Secretary of War was required to report all settlements to the

Congress, and Congress reserved to itself, or agencies appointed by it, the right to review any such settlements, and to the Government the right to recover any money fraudulently paid. By section 2 of that Act the Court of Claims is given jurisdiction to consider the claim of any person who is dissatisfied with the action of the Secretary of War.

By Section 5 of the same Act the Congress committed the administration of the war minerals relief features thereof to the Secretary of the Interior, with power to adjust claims thereunder. Like Sections 204 and 209 of the Transportation Act, and unlike the previous sections of the same Act, where a right of review of the Secretary of War's action is specifically reserved by the Congress, no provision was made for the review of the Secretary of the Interior's action in connection with war minerals relief under Section 5.

What happened in the construction of Section 5 of the Dent Act is a striking example of what this Court holds with reference to the finality of action in connection with these matters, both upon questions of law and fact, where no review is provided.

One Rives presented a claim under Section 5 to the Secretary of the Interior on account of moneys lost by reason of a contract of purchase of a manganese mine, which mine became worthless after the armistice, and upon which he had lost the sum of $9,000.00. The Secretary of the Interior denied this claim because, in his opinion, it did not come within Section 5 as a matter of law, in that Section 5 covered only moneys expended upon property in producing or preparing to produce manganese, and did not include the purchase price thereof. Rives commenced an action in the Supreme Court of the District of Columbia, seeking a writ of mandamus to compel the Secretary

of the Interior to adjust his claim. This proceeding reached the Supreme Court of the United States. In denying the claimant Rives any relief, this Court said:

> "Congress intended the Secretary to act for it, and to construe the meaning of the words used to decribe the elements of the net losses to be ascertained and to give effect to his interpretation without the intervention of the courts. This statute presents a case of as wide discretion as was held to have been vested in the Secretary of the Navy in the Decatur case."

Work *v.* Rives, 267 U. S. 175, 182.

In this same case this Court held, speaking of Section 5, that:

> "Congress did not wish to create a legal claim. It was not dealing with vested rights. It did not, as it did with the claims for supplies and services directly furnished the government under the first and second sections of the act, make the losses recoverable in a court, but expressly provided otherwise. It dealt with the subject with the utmost caution. * * * It vested the Secretary with power to reject all losses except as he was satisfied that they were just and equitable and it made his decision conclusive and final. * * *"

Work *v.* Rives, 267 U. S. 175, 181, 182.

To the same effect:

Work *v.* Chestatee Co., 267 U. S. 185, 187.

As hereinafter shown, the same finality attaches to the certificate of the Interstate Commerce Commission as a

special tribunal under the provisions of Section 212 (a) of the Transportation Act, 1920 (Appendix 32). In the case of *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, 53 S. Ct. 28, 31, 32, this Court specifically held a certificate issued under Sections 209 (Guaranty to carriers under Federal control at the time Federal control terminated) and 212 (a) to be final and conclusive under the terms of the Act itself, and also in conformity with the intent of Congress in enacting the same. No distinction of any kind can be made between Section 5 of the Dent Act, and the cases construing it, and Sections 204, 209 and 212 of the Transportation Act, and the cases construing these Sections as hereinafter set out.

After the decision in the case of *Work* v. *Rives*, 267 U. S. 175, above quoted, the Congress, by Act of February 13, 1929, 45 Stats. 1166, authorized the Supreme Court of the District of Columbia to review the final decision of the Secretary of the Interior upon any question of law arising under Section 5 of the Dent Act.

Thereafter the Vindicator Consolidated Gold Mining Company, having been denied a claim based upon its investment in manganese mines, brought an action to review the decision of Secretary Wilbur, the then Secretary of the Interior, in denying a claim similar to that denied Rives in the *Work* case.

This Court affirmed the judgment of the Circuit Court of Appeals in granting the relief, holding that the Secretary of the Interior placed an erroneous construction upon Section 5 in failing to allow such claims, but that the above amendment permitted review on questions of law.

> Wilbur, Secretary, *v.* United States *ex rel.* Vindicator Gold Mining Company, 284 U. S. 231, 234, decided December 7, 1931.

To the same effect and arising out of the same subject matter originally involved in *Work* v. *Chestatee Company*, 267 U. S. 185:

> Wilbur, Secretary, *v.* United States *ex rel.* Chestatee P. & C. Corporation, 53 Sup. Ct. 293, 294, decided January 16, 1933.
>
> Ickes, Secretary, *v.* United States *ex rel.* Chestatee P. & C. Corporation, 53 Sup. Ct. 700, 701, decided May 29, 1933.

The *Work* case was decided March 2, 1925, and prior to the time when Congress had authorized a review of the Secretary's decisions on questions of law. The Congress has never authorized a review of the decisions of the Interstate Commerce Commission in the administration of the railroad relief provided by Sections 204, 209 and 212 of the Transportation Act, and, by parity of reasoning, the rule must be the same as that enunciated in the *Work* case.

This is not a new rule. It was recognized by the Supreme Court of the United States as early as 1851 in the case of *United States* v. *Ferriera*, 13 Howard 39. In that case the Congress, for the purpose of adjusting claims under a treaty with Spain, provided that a Judge of the United States District Court in Florida would investigate claims and submit his findings to the Secretary of the Treasury, who might approve or disallow the award. An attempt was made to appeal from the decision of the judge in the allowance of a claim. This Court said, at page 47:

> "The decision is not the judgment of a court of justice. It is the award of a commissioner. The act of 1834 calls it an award. And an appeal to this court from such a decision, by such an authority from the

judgment of a court of record, would be an anomaly in the history of jurisprudence. An appeal might as well have been taken from the awards of the board of commissioners, under the Mexican treaty, which were recently sitting in this city. * * * *It cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an act of Congress.*" (Italics ours.)

United States *v.* Ferriera, 13 Howard (54 U. S.) 39, 47.

To the same effect:

United States *v.* Arredondo, 6 Peters 691, 728.

The above cases are clearly applicable herein, and, in the language of this Court last quoted, where the Congress provides for the adjustment of claims against the Government and commits them to any tribunal for decision, "it cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an Act of Congress." After the Secretary of the Interior denied the manganese claims purely on questions of law, and this Court, in *Work* v. *Rives,* 267 U. S. 175, held his decisions final, the Congress passed a special act authorizing the review of such decisions on questions of law only. Thereafter, in *Wilbur* v. *Vindicator Gold Mining Co.,* 284 U. S. 231, this Court, having then been given the authority to review the decisions of the Secretary on questions of law, found that the Secretary was in error in his interpretation of the law, though Rives had formerly been denied relief under similar circumstances because there was no Act of Congress authorizing a review.

3. THE DECISION OF THE INTERSTATE COMMERCE COMMISSION AWARDING REIMBURSEMENT TO PETITIONER WAS AND IS FINAL AND CONCLUSIVE.

IT CANNOT BE RE-OPENED, REVIEWED, REVERSED OR SET ASIDE, THERE BEING NO SUCH CONCURRENT OR SUBSEQUENT AUTHORIZATION BY ACT OF CONGRESS.

The Circuit Court of Appeals held herein:

> "But, under the admitted facts, its case was not one which the Commission was authorized to consider at all. It has been clearly settled that the Courts have full right when appealed to, to determine by independent hearing, whether agencies of the government to which have been committed duties involving the exercise of administrative functions, or powers of a judicial nature, have exercised their powers with respect to the particular persons or subject matter designated by Congress. If the power is lacking the act is void." (R. 91.)

Undoubtedly, courts have the right to determine originally the purpose and effect of any statute, just as this Court determines the purpose and effect of the provisions of the Constitution of the United States, in any appropriate hearing, independent or otherwise. Such determination becomes the foundation upon which the rights of the parties litigant are to be declared. It is submitted that the courts may have further functions, but this is not necessarily so. Two examples may be given.

If the purpose and effect of the statute, as so determined by the courts, be to vest an agency of the Government with power to construe the statute and apply such construction

to the facts, then the courts cannot be appealed to in the absence of specific statutory provisions for review. Such are the instant case and the case of *Work* v. *Rives,* 267 U. S. 175.

On the other hand, if the purpose of the statute be to vest an agency of the Government with the limited authority of applying the provisions of the statute to the facts in the case under consideration, the courts can again be appealed to, and, in the event that the agency of the Government erroneously construes or applies the statute, the courts may proceed, by review, mandamus, appeal, statutory or otherwise, to correct the error. Such is the case of *Wisconsin Central Ry.* v. *United States,* 164 U. S. 190, cited by the Circuit Court of Appeals herein. (R. 92.)

As this Court said in *Work* v. *Rives,* 267 U. S. 175, 177, 178:

> "Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such a case can control by mandamus his interpretation, even if it may think it erroneous. The cases range, therefore, from such wide discretion as that just described to cases where the duty is purely ministerial, where the officer can do only one thing, which on refusal he may be compelled to do. * * * Between these two early and leading authorities, illustrating the extremes, are decisions in which the discretion is greater than in the *Kendall Case* and less than in the *Decatur Case,* and its extent and the scope of judicial action in limiting it depend upon a proper interpretation of the particular statute and the congressional purpose."

The Interstate Commerce Commission was given by Section 204, and had, the power and discretion to determine

what carriers were within the Act and entitled to reimbursement, as well as the amount of such reimbursement. The power was not lacking, the determination of the Commission was valid and final, as decided by the courts in the cases herein, and the courts cannot again be appealed to for determination of the correctness of the Commission's action under such power and in accordance with such discretion, there being no statutory provisions for review thereof.

In speaking of the Interstate Commerce Commission, this Court has said:

> "In some matters its duty is merely to investigate and to report facts. (Citing cases.) *In others, to make determinations.* See *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, 48 S. Ct. 466, 72 L. Ed. 838. In some, it acts in an advisory capacity. (Citing cases.) In others in a supervisory." (Italics ours.)
>
> United States *v.* Atlanta B. & C. R. Co., 282 U. S. 522, 527.

Moreover, this Court in its decision in *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, 48 S. Ct. 466, 72 L. Ed. 838, recognized the application of the principles enunciated in the case of *Work* v. *Rives,* 267 U. S. 175, to Section 209 of the Transportation Act, in the following language:

> "We have no occasion to inquire whether a remedy at law or some other remedy in equity is available. The mere fact that the certificate may be conclusive, if it be a fact, would not entitle the company to a judicial review. Compare United States *v.* Babcock, 250 U. S. 328, 331, 39 S. Ct. 464, 64 L. Ed. 1011; Work *v.* Rives, 267 U. S. 175, 45 S. Ct. 252, 69 L. Ed. 561."

Great Northern Railway Co. *v.* United States, 277 U. S. 172, 182.

And in the case of *United States* v. *Great Northern Railway Co.*, 287 U. S. 144, 53 Sup. Ct. 28, 31, 32, which was a suit by the Government to recover moneys paid to the Great Northern Railway Company under Sections 209 and 212, this Court held that such certificates were final and that such was the intention of Congress.

As to the true construction of Sections 209 and 212, this Court said:

> "Mistake and illegality being thus excluded from the reckoning, we are brought to a second ground for reclamation put forward by the Government. The argument is made that, by the true construction of the statute, a certificate issued by the Commission under section 212 is provisional and tentative; that, upon the issuing of a final certificate of inconsistent tenor, it is superseded and nullified as to the past as well as to the future; and that payments made under its authority, though legal in the making, become illegal by retroaction. We do not so interpret the meaning of the statute. * * *"

United States *v.* Great Northern Ry. Co., 287 U. S. 144, 53 Sup. Ct. 28, 31.

And as to the intention of Congress, after referring to the legislative history of the measure, and the statements by those in charge of it during its consideration in Congress, this Court said:

> "* * * If such recourse be had, there is confirmation of the view that the certificates were more than estimates of provisional advances. Subdivisions a and

b, as originally introduced, drew no distinction as to the effect of payments made thereunder, the certificates being as conclusive under the one as under the other. A proposed amendment to modify subdivision b by making the effect of such certificates *prima facie*, but not conclusive, was carried. 60 Congressional Record, part 3, pages 2815, 2816. A separate proposed amendment to modify subdivision a in substantially the same way was rejected. 60 Congressional Record, part 3, pages 2812, 2815. In the discussion of these amendments, the inquiry was pressed whether the Government would be helpless if the certificates were too high. The answer was emphatic that the certificates were final. 60 Congressional Record, part 3, pages 2739, 2802, 2803, 2809, 2812, 2813."

United States *v.* Great Northern Ry. Co., 287 U. S. 144, 53 Sup. Ct. 28, 32.

Since Section 212 has to do with certificates issued under Section 204, as well as under Section 209, it would follow that this Court has established the conclusiveness and finality of certificates issued by the Interstate Commerce Commission under these Sections.

This Court furthermore has expressly held that the Government is precluded from recovering payments made to carriers under Federal control at the termination of Federal control under Section 209 (Guaranty section), and Section 212, and has expressly distinguished the case of *Wisconsin Central Ry. Co.* v. *United States,* 164 U. S. 190, and similar cases (cited by the Circuit Court of Appeals herein, R. 92), in the case of *United States* v. *Great Northern Ry. Co.,* 287 U. S. 144, 53 S. Ct. 28, 31. In that case the Court said:

"In these circumstances we find no basis for a hold-

ing that the payment made to the respondent under the partial certificate of March 1, 1921, was due to any mistake of fact, either unilateral or mutual. United States *v.* Barlow, 132 U. S. 271, 280, 281, 10 S. Ct. 77, 33 L. Ed. 346. Cf. Gordon *v.* Butler, 105 U. S. 553, 557, 558, 26 L. Ed. 1166. The officials of the government knew precisely what they were doing, and kept well within the statute defining their authority. They did not act illegally like the officials whose acts were challenged in the cases cited by the petitioner. Wisconsin Central Railroad Co. *v.* United States, 164 U. S. 190, 17 S. Ct. 45, 41 L. Ed. 399; Grand Trunk Western Railway Co. *v.* United States, 252 U. S. 112, 40 S. Ct. 309, 64 L. Ed. 484; Burnet *v.* Porter, 283 U. S. 230, 51 S. Ct. 416, 75 L. Ed. 996. Charged with a difficult task exacting judgment and discretion, they came to a decision in good faith with knowledge of the relevant facts and without departure from the law. If the payment under their certificate is to be reclaimed, some other ground than mistake or illegality must be found to sustain the reclamation."

Since, as has been heretofore shown, the Commission was given power under Sections 204 and 212 to construe the statute and determine the facts, *to wit:* To determine what carriers came within the provisions of Section 204, as well as the amount of reimbursement to be awarded to each (compare *Work* v. *Rives,* 267 U. S. 175, *United States* v. *Ferriera,* 13 Howard 39), then the Commission kept within the authority granted it and did not depart from the law, and did not act illegally. An erroneous and unwarranted construction of the statute as alleged in the complaint, if the construction be erroneous and unwarranted, which is not conceded, made by the agency of

the Government having authority to construe the statute, is not such an illegality as is contemplated by the above language of this Court. Since no mistake of fact was alleged herein and no illegality appears herein, because the legality of the construction depends on the authority to construe, there is nothing in the instant case to permit a review by the courts, statutory or otherwise, or to sustain reclamation.

In the broad principle, the instant situation is not unlike *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, 53 Sup. Ct. 28, 30 (decided November 7th, 1932), where this Court dealt with the question of difference in matters of opinion. There the railroad filed its claim with the Commission under Section 209, and was paid $12,500,000. Later the Commission revised its judgment and determined that the railroad was entitled to a lesser sum and had been overpaid by the difference. Demand was made, as here, on the railroad, with resulting suit by the United States. In denying recovery this Court said: *"Mistake also there was none, but merely a revision of judgment in respect of matter of opinion."* (Italics ours.)

Parenthetically, no fraud is alleged or appears herein as ground for relief.

Nor is the decision of this Court in the case of *Continental Tie & Lumber Co.* v. *United States,* 286 U. S. 290, inconsistent with the rule that the power and jurisdiction of the Interstate Commerce Commission under Section 204 was judicial in character and not ministerial by reason of the fact that this Court in its opinion in that case, at page 295, held that:

> "* * * The petitioner correctly states that at the date of the Act's adoption no railroad had a vested right in any amount; until the Commission made an award nothing could be paid, no proceeding was avail-

able to compel an allowance, or to determine the elements which should enter into the calculation. In short, says the petitioner, the carrier had no rights, but was dependent solely upon the Commission's exercise of an unrestrained discretion, and until an award was made nothing accrued. But we think that the function of the Commission under the act was ministerial, to ascertain the facts with respect to the carrier's operating income by a comparison of the experience during the test period with that during the term of Federal control. The right to the award was fixed by the passage of the Transportation Act. What remained was mere administrative procedure to ascertain the amount to be paid. Petitioner's right to payment ripened when the act became law. What sum of money that right represented is, of course, a different matter."

The above statement was made in connection with the discussion as to when the reimbursement accrued to the carrier under Section 204 so as to fix the year in which the amount should be returned as income under the Federal Income Tax Law. Obviously the right to the award was fixed by the passage of the Transportation Act. The calculation and accounting necessary to determine the amount of the award might be called ministerial, but when so stated no point was made in the decision as to whether the jurisdiction and power then being exercised was of a ministerial or of a judicial character as herein otherwise discussed. Nevertheless both the determination of the carrier entitled to the award and the amount of the award were referred to the Interstate Commerce Commission for decision.

If it should be argued that the *Continental Tie* case, 286 U. S. 290, goes further than this, it is respectfully submitted that the rule is clarified by the later decision of

this Court in the case of *United States* v. *Great Northern*, 287 U. S. 144, 53 S. Ct. 28, hereinbefore discussed, wherein methods of calculation were used by the Interstate Commerce Commission which were later revised by the Commission itself, but this Court held that the award under the former methods of calculation was final and conclusive and not subject to review by the Commission or by any court because such was the meaning of the Act and such was the intention of Congress.

The statute fixed the right but did not designate the recipient. Congress by Sections 204 and 209 of the Transportation Act gave to the Interstate Commerce Commission power and jurisdiction to determine the recipients and to ascertain the amount of reimbursement to each. Congress could have provided for appeal to the courts from, or other review of, the decision of the Interstate Commerce Commission, but did not do so. The decision of the Interstate Commerce Commission became final whether the duty be denominated judicial or ministerial.

In *United States* v. *Arredondo*, 6 Peters, 691, 728, 8 L. Ed. 563, this Court said:

> "It is a universal principle that where power *or jurisdiction is delegated to any public officer or tribunal over a subject matter* and its exercise is confided to his or their discretion, *the acts so done are binding and valid as to the subject matter* and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public or any person denying its validity, *are power in the officer and fraud in the party. All other questions are settled by the decision made or the*

act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for or other revision by some appellate or supervisory tribunal is prescribed by law." (Italics ours.)

Again it may be asserted that the rule of the *Work* case (*Work* v. *Rives*, 267 U. S. 175) is to be distinguished from the rule to be applied in the case at bar for the reason that in the *Work* case the Secretary of the Interior was considering items to be reimbursed, to wit, money expended on a contract to purchase land valuable for manganese, whereas in the case at bar the Interstate Commerce Commission was called upon to decide whether the petitioner was such a carrier as came within the terms of Section 204. But it must be remembered that the item to be reimbursed in accordance with the decision of the Secretary of the Interior in the *Work* case identified the recipient of the reimbursement, and the determination of the Secretary of the Interior that the item was not to be reimbursed was a determination that the claimant who expended money for that item was not entitled to reimbursement. In the case at bar the item to be reimbursed under Section 204 was the decrease in railway operating income in the Federal control period as compared to the railway operating income during the test period. Thus the item to be reimbursed identifies the carrier entitled to reimbursement and, therefore, no distinction can be drawn between the rule in the *Work* case and the rule which should be applied in the case at bar.

The Interstate Commerce Commission under the statute was constituted a court to deal with petitioner's and kindred claims. It had jurisdiction to consider them. The test of the Commission's jurisdiction is whether it had power to enter upon the inquiry, which concededly it had, and not whether its conclusions in the course of such in-

quiry were right or wrong, for if the law confers the power to render a judgment in a particular case, then the court has jurisdiction. It is not whether good cause exists for granting relief, but whether the tribunal had power to determine by inquiry whether it would grant relief or not.

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits. * * * Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction."
>
> General Investment Co. *v.* N. Y. C. R. R., 271 U. S. 228.

The gist of the action is that the construction placed by the Interstate Commerce Commission on the word "deficit" as used in paragraph (a) in *Construction of the Word "Deficit,"* (66 I. C. C. 765) was "an erroneous and unwarranted construction" not in harmony "with the accepted use of said word," or of its "use as found elsewhere in said Transportation Act." In other words, the complaint simply charges, not fraud, not mistake of fact, not mistake of law, not lack of power, but solely "erroneous and unwarranted construction."

The construction is not erroneous, because it is a proper construction and conforms to the legislative intent, as hereinbefore shown.

However, an erroneous and unwarranted construction of the law or the facts is no basis for setting aside the

decision and award of reimbursement. Congress invested the Commission with the power and directed it to investigate, examine into and finally and conclusively determine the validity and amount of each claim presented. Congress knew the Commission was composed of human beings who might err in judgment, yet it was selected "because", in the language of this Court in the case of *Great Northern Railway Company* v. *United States*, 277 U. S. 172, 180, "of its special fitness * * * knowledge of railroads and experience in railroad accounting * * * custody of the records of railroad operations and its staff competent to make speedily the necessary investigations."

Its certificate was final. *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, 53 Sup. Ct. 28, 31, 32. Having the power to act, it had the power to decide. The jurisdiction to decide carried with it the power to decide honestly either correctly or erroneously. If the Commission decided wrongly, it did not usurp an unconferred jurisdiction, because the authority to determine in no wise depends on the nature or correctness of the decision rendered. Men are so fallible, and human discernment so imperfect, that the power to hear and finally determine necessarily carries with it the power which makes the determination obligatory without reference to the question whether it be right or wrong. Controversies must come to an end some time. No case can be found where a determination of the character involved herein has been set aside in a collateral action on the ground of error of judgment as respects either fact or law on the part of the tribunal rendering it.

In *United States* v. *Wildcat*, 244 U. S. 111, this Court held that an error of judgment was not ground for setting aside a quasi-judicial determination, because:

"A correct conclusion was not necessary to the

finality and binding character of its decisions. It may be that the Commission in acting upon the many cases before it, made *mistakes which are now impossible of correction.* This might easily be so, for the Commission passed upon the rights of thousands claiming membership in the tribe and ascertained the rights of others who did not appear before it, upon the merits of whose standing the Commission had to pass with the best information which it could obtain.

"When the Commission *proceeded in good faith to determine the matter* and to act upon information before it, not arbitrarily, but according to its best judgment, we think *it was the intention of the act that the matter, upon the approval of the Secretary should be finally concluded and the rights of the parties forever settled,* subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake." (Italics ours.)

To the same effect:

United States *v.* Moser, 266 U. S. 236, 242.
United States *v.* California & Oregon Land Co., 148 U. S. 31.

The error in the decision of the Circuit Court of Appeals herein is further demonstrated by decisions of the Court of Claims and the Court of Appeals of the District of Columbia, directly in point as involving the finality of, and lack of provision for review of, decisions rendered by the Interstate Commerce Commission under Section 204.

While these decisions do not, perhaps, have the weight of ultimate authority in this Court, even though petitions for writs of certiorari were denied by this Court in each case, they are very persuasive herein.

For example, the Court of Appeals of the District of Columbia held:

> "We have reviewed this case at considerable length, in order that the numerous errors committed by the commission, growing out of its refusal to treat the combined lines as a 'system of transportation,' may become apparent. These errors, however, we are unable to correct in this proceeding. This is not a case where the commission has, for any reason, refused to assume jurisdiction of the case, as in Kansas City Southern Railway Co. *v.* Interstate Commerce Commission, 40 S. Ct. 187, 252 U. S. 178, 64 L. Ed. 517; but it falls within our holding in U. S. *ex rel.* Abilene & Southern Railway Co. *v.* Interstate Commerce Commission, 8 F. (2d) 901, 56 App. D. C. 40. *The Commission has construed the statute and applied its construction to the facts, and, however erroneous its conclusions, under recent decisions of the Supreme Court, are beyond our jurisdiction to correct in this proceeding.*" (Italics ours.)
>
> United States *ex rel.* C. C. etc. Ry. *v.* Interstate Commerce Commission, 11 Fed. (2d) 554, 556 (*Certiorari* denied, 273 U. S. 706).

To the same effect:

Wyandotte Terminal R. R. Co. *v.* United States Court of Claims, 64 Court of Claims, 328 (*Certiorari* denied, 276 U. S. 630);

United States *ex rel.* Abilene, Etc., Ry. Co. *v.* Interstate Commerce Commission, Court of Appeals of the District of Columbia, 8 Fed. (2d) 901, 902 (*Certiorari* denied, 270 U. S. 650);

United States *ex rel.* Empire & S. E. Ry. Co. *v.* Interstate Commerce Commission, Court of Ap-

peals of the District of Columbia, 45 Fed. (2d) 293, 294 (*Certiorari* denied, 283 U. S. 834).

And to the same effect in construing Section 209:

Northern Pacific Railway Company *v.* Interstate Commerce Commission, Court of Appeals of the District of Columbia, 23 Fed. (2d) 221, 223 (*Certiorari* denied, 275 U. S. 572).

True, these cases were cases where the Commission had denied relief to the claimant and the claimant was attempting to obtain relief in the courts. These courts, following the rules announced by this Court in other cases, held that the action of the Commission, no review having been authorized by Congress, was final and conclusive.

This Court should determine whether the citizen is to be bound by the decisions of the Commission in this class of cases because the Congress provided no right of review, while the Government of the United States is to be given that right.

The fact that other railroads were later denied reimbursement under identical circumstances and conditions should be immaterial. The petitioner and other railroads which received reimbursement are entitled to retain the same. If other railroads similarly situated have been denied reimbursement under later decisions of the Interstate Commerce Commission, Congress may afford relief by amendment to permit appeal or review on questions of law, as was done in connection with the War Minerals Relief Act following the decision in the case of *Work* v. *Rives* (267 U. S. 175).

The error in the decision of the Circuit Court of Appeals in this connection is further clearly demonstrated by an analysis of the decisions of this Court, cited by that Court to sustain its statement that:

"It has been clearly settled that the Courts have full

right when appealed to, to determine by independent hearing, whether agencies of the government to which have been committed duties involving the exercise of administrative functions, or powers of a judicial nature, have exercised their powers with respect to the particular persons or subject matter designated by Congress. If the power is lacking the act is void." (R. 91, 92.)

The cases are:

Crowell *v.* Benson, 285 U. S. 22;
Interstate Commerce Commission *v.* Ill. Cent. R. R., 215 U. S. 452;
Southern Pacific Co. *v.* Interstate Commerce Commission, 219 U. S. 433;
Interstate Commerce Commission *v.* Union Pacific R. R., 222 U. S. 541;
Tagg Bros. & Moorehead *v.* United States, 280 U. S. 420, at page 442.

It is respectfully submitted that not one of these cases has any bearing on the question involved, and that the decisions of this Court hereinbefore discussed are controlling. As already shown under the holding of this Court in the case of *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, 180, the Commission under Section 204 was not acting as the Interstate Commerce Commission but as a special tribunal.

The Circuit Court of Appeals fell into error by assuming that Section 204 of the Transportation Act was an amendment of the Interstate Commerce Act, in stating (R. 84) that:

"The Transportation Act, approved February 28, 1920 (41 Stats. page 456), which amended the Interstate Commerce Act, provided (Sec. 204) that the Fed-

eral control of the railroads should terminate on March 1, 1920."

Section 204 of the Transportation Act is not an amendment of the Interstate Commerce Act, nor any part of the Interstate Commerce Act, and the procedure to be followed in determining the rights of claimants and of the Government under Section 204 is not governed by the Interstate Commerce Act. This Court has said so in the case of *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, 180, as follows:

> "Congress distinguished clearly, in framing Transportation Act, 1920, between provisions which were amendments of the Interstate Commerce Act and those which, while relating to railroads, were not. The amendments were grouped under Title IV. The provisions here involved, which related solely to the termination of federal control, were grouped under Title II. Those which provided for the Railroad Labor Board under Title III. Because issuing certificates is not a part of the Commission's delegated power to regulate commerce, and is not an incident of such regulation, the special remedy provided by the Urgent Deficiencies Act, is not available to review the legality, or correctness of its action in doing so."

Notwithstanding these declarations by this Court, showing clearly that the Interstate Commerce Act had no relation to the functions of the Interstate Commerce Commission in the adjustment of these railroad claims, still the Circuit Court of Appeals cited the three Interstate Commerce Commission cases to sustain its right to review the action of the Commission. That Court also cited *Crowell* v. *Benson*, 285 U. S. 22, a case arising under the Longshoremen's and Harbor Workers' Compensation Act (March

4, 1927, c. 509, 44 Stat. 1424). Section 21 of that Act provides for a review by the court, and that case itself expressly recognizes this fact. Again, the Circuit Court of Appeals cited in support of its conclusion *Tagg Bros. & Moorehead* v. *United States,* 280 U. S. 420, a case arising under the Packers' and Stockyards' Act (August 15, 1921, c. 64, Sec. 301 to 316, 42 Stat. 163). Section 316 of that Act specifically provides for a review of all orders in connection therewith, in the same manner as orders made by the Interstate Commerce Commission as such.

In treating Section 204 as an amendment to the Interstate Commerce Act, the Circuit Court of Appeals no doubt assumed that the orders of the Commission were reviewable under the Interstate Commerce Act as such.

The cases cited by the Circuit Court of Appeals, as heretofore pointed out, have no application to the question of a review of the award of reimbursement to petitioner because they are cases where a review was specially provided by the Act of Congress in each case, where none is provided in the instant case.

It is, therefore, respectfully submitted that the Circuit Court of Appeals herein erred in affirming the judgment of the District Court in reviewing the decision of the Interstate Commerce Commission and in sustaining reclamation herein, in view of the decisions of this and other courts, hereinbefore discussed, and that there is no support for the same in the cases cited by that Court.

4. THE INTERSTATE COMMERCE COMMISSION HAD NO POWER TO RESCIND AND SET ASIDE ITS AWARD OF REIMBURSEMENT—*A FORTIORI,* IT HAS NO SUCH POWER AFTER ITS PERSONNEL HAD BEEN CHANGED.

The third affirmative defense is based upon the fact that the personnel of the Interstate Commerce Commission

changed between the award of reimbursement to petitioner (94 I. C. C. 617), and its attempted rescission and setting aside of the same (117 I. C. C. 780) and that such action was not within its power (R. 54).

This court will take judicial notice of the personnel of the Commission, the time of accession to office and the term of office (*N. Y. & M. P. L. R.* v. *Winans*, 58 U. S. 30, 40), and will therefore note that between the decisions of the Interstate Commerce Commission construing the word "deficit" in Section 204 in 1922 (66 I. C. C. 765), and in 1925 (99 I. C. C. 724), two of the Commissioners who determined the earlier case were succeeded by two new Commissioners in the determination of the second case. The two new Commissioners by their vote in the later case changed the interpretation; their two votes made a majority; their votes would have made a majority either way.

Certainty is of the very essence of the law. Shifting and changing rules or principles do not constitute law. In our system of Government where changes of officers are so frequent, it is of great importance that there shall be no right in a new officer to reverse the decisions of his predecessors. Unless this principle is followed, administrative and judicial action would become involved in chaos; hence the reason for the rule of finality.

> Grifenhagen *v.* Ordway, 218 N. Y. 481;
> Walling *v.* Brown, 76 Pac. (Idaho), 318;
> Francis Palms, *et al.*, 7 Land Decisions 147.

If the position of the Government is sound in the instant case each succeeding Commission may make and revoke certificates and treat petitioner's claim as constantly before it.

Furthermore, it does not avail the Government herein that the Commission attempted to reverse its decision and

award, and rescind its settlement with petitioner. The principles hereinbefore discussed, denying to the courts the authority to review decisions of the Commission herein, are equally prohibitive of any subsequent action by the Commission itself. The finality attached to the certificate itself under Section 212 (a) and as intended by the Congress (compare *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144; 53 Sup. Ct. 28, 31, 32), precludes such subsequent action. Nor does Title II of the Transporation Act (Appendix 21), by amendment or otherwise, contain any statutory provision authorizing the Commission to grant rehearings and correct miscalculations. (Compare *Work* v. *Rives*, 267 U. S. 175, 180, 182).

5. THE REIMBURSEMENT PAID TO PETITIONER WAS IN NO SENSE A SUBSIDY OR BONUS, AND THE GOVERNMENT HAS NO OTHER OR BETTER RIGHT THAN ANY INDIVIDUAL TO RECLAIM THE SAME.

THE MONEY *EX AEQUO ET BONO* BELONGS TO PETITIONER.

The Circuit Court of Appeals herein held (R. 92):

> "The United States may demand repayment of money paid out by its officers or agents where no authority of law exists for such payment. Persons so receiving public funds are charged with knowledge that they have taken that to which they have not the right, and are bound, upon demand, to return it. Decisions determining the question differently where private parties are wholly concerned, are not pertinent. No estoppel as for voluntary payment can be claimed to defeat the suit of the Government."

The Circuit Court of Appeals thus decided that the question herein might have been determined differently were private parties wholly concerned. This was error. This Court has held that the rules of law which apply to the Government and to individuals are the same. This Court, in *McKnight* v. *United States,* 98 U. S. 179, 185, said:

> "It is true the assignment was contrary to law, and therefore, a nullity, but there was nothing contrary to good morals or conscience in the payment or receipt of the money. The facts were all known. There was no indirection, concealment, or improper purpose on either side. * * * Under the circumstances, it is quite clear that if the controversy were between private parties, there could be no recovery. I Story, Contract, Sect. 541. With a few exceptions, growing out of considerations of public policy, the rules of law which apply to the Government and to individuals are the same. There is not one law for the former and another for the latter."

Again, in *United States* v. *Hill,* 120 U. S. 169, 182, action was brought by the Government to recover damages for defendant's failure as a clerk of court to account for certain fees he had received. In denying recovery, this Court said:

> "With this long practice, amounting to a contemporaneous and continuous construction of the statute, in a case where it is doubtful whether the statute requires a return of the disputed fees, judges of eminence, heads of departments, and accounting officers of the Treasury having concurred in an interpretation in which those concerned have confided, the surety in the present bond, as well as his principal, had a right

to rely on that interpretation in giving the bond; and the semi-annual accounts of the principal having been actually examined and adjusted at the Treasury, with the naturalization fees excluded, down to and including the one last rendered five months before this suit was brought, *a court seeking to administer justice* would long hesitate before permitting the United States to go back, and not only as against the clerk, but as against the surety on his bond, *reopen what had been settled with such abundant and formal sanction. This principle has been applied, as a wholesome one, for the establishment and enforcement of justice, in many cases in this court, not only between man and man, but between the government and those who deal with it, and put faith in the action of its constituted authorities, judicial, executive and administrative.*" (Italics ours.)

In view of the above decisions of this Court, it is submitted that the decision of the Circuit Court of Appeals was based upon an erroneous assumption that the question should be decided differently, where the Government is involved.

Continuing, the Circuit Court of Appeals herein said (R. 93):

"No conditions are present like those where a person has contracted with a Government agency and received payment in return for a consideration actually rendered by him (as the performance of work) and it has later been discovered that the contract was not legally authorized. Here the railroad company returned nothing to the Government in exchange for the money received. * * *"

This Court in two recent cases decided on May 16, 1932, *Texas & Pac. Ry. Co.* v. *United States*, 286 U. S. 285, 289, considering Section 209, and *Continental Tie & Lumber Co.* v. *United States*, 286 U. S. 290, 293, considering Section 204, has specifically held otherwise.

In the latter case this Court said:

> "What we have said in Texas & Pacific Railway Co. *v.* United States, decided this day, 286 U. S. 285, is determinative of the first contention. Section 209 of the Transportation Act (49 U. S. C. A., Sec. 77) guaranteed the payment of any deficiency below a fixed minimum of operating income for the six months ensuing the termination of Federal control to railroads which had been taken over by the United States. By the terms of Section 204, payment was to be made to railroads not under Federal control of a proportion of any operating deficit suffered in the period of such control. The underlying purpose of Congress was the same in both cases. Railroads falling within Section 204 were principally short lines. They were known to have suffered serious losses in income due to routing arrangements and other administrative measures made necessary by government operation of the larger railroad systems. The Transportation Act did not contemplate that the payments to be made pursuant to Section 204 were in any sense just compensation for the taking of property. There was no room for such reimbursement, as the short lines were during the time to which the section applied in the possession and management of their owners. Congress, nevertheless, realized that Federal operation had caused them consequential losses, at least partial redress for which was the purpose of the section where actual deficits in income had resulted. For the reasons set forth in Texas & Pacific Ry. Co. *v.*

United States, *supra*, we hold that these payments were not subsidies or bonuses, but were income within the intent of the amendment and the statute."

Continental Tie & Lumber Co. *v.* United States, 286 U. S. 290, 293.

These cases arose under the Federal Income Tax Law, and considered the question as to whether the payments made under these sections to the railroads were subsidies or taxable income, and in both cases it was held that such payments were taxable income. If the railroads had surrendered nothing in exchange for such payments, they could not have been considered income, and therefore, the question was directly involved and the error is clear.

The Circuit Court of Appeals herein further said (R. 93):

"Plaintiff had only to show that the money was improperly paid as described. What use appellant thereafter made of it is immaterial. No estoppel can be claimed because it disbursed the fund and was taxed because of the possession and claimed ownership of it. The decisions cited affirming the right of the United States to recover public money so paid out without authority of law, as a corollary must imply that there is no estoppel under conditions such as this case presents."

The following statement of the true rule runs through all of the cases:

"To say that a plaintiff can recover money paid by mistake notwithstanding the recovery will throw a loss upon the defendant provided the plaintiff is under no obligation to the defendant, is to lose sight of the grounds upon which a recovery is allowed—namely,

that the defendant has money which in conscience he cannot keep. It seems difficult to establish in a case where the defendant cannot be said to be more responsible for the mistake made by the plaintiff than is the plaintiff himself, that he should in conscience return to the plaintiff money paid under mistake, where the result of such repayment is to throw a loss upon the defendant which he would not have suffered had not the payment been made. The principal that forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself against loss at the expense of an innocent and blameless defendant."

Keener on Quasi-Contracts, page 67.

The second affirmative defense (R. 50) deals with the changed *status in quo* of petitioner brought about by its having filed its claim under Section 204 at the invitation of the Government, its having incurred large outlays for attorneys and accountants in connection therewith, and in the payment of taxes as a result thereof and, finally, its having distributed the proceeds of said claim in the form of dividends to its stockholders as a result of which petitioner now, if called upon to make good the amount so received under the circumstances, would be unable to so do and would be wholly insolvent. Under these circumstances in equity and good conscience, petitioner should not be now compelled to satisfy this demand of the United States.

The proceeding invoked by the United States is an action at law wherein the doctrine of quasi-contract is invoked on the theory that money was paid to petitioner by reason of mistake. That, notwithstanding the absence of any wrong, or of any promise expressed, or implied, to return it, petitioner in equity and good conscience should

not be permitted to retain this money and thereby unjustly enrich itself at the expense of the Government.

Under proper circumstances, such an action in implied *assumpsit* will undoubtedly lie. However, it must appear before a recovery will be permitted, that the results have visited no inequities or injustice upon innocent defendants. Where, as here, the United States seeks a recovery from petitioner in this kind of an action the fact that petitioner has changed its position, to its damage, as a result of the voluntary payment of the sum in question by the United States, and the fact that petitioner cannot now be placed in *statu quo*, constitutes a complete bar to the right of recovery in this proceeding.

The title to the sum paid petitioner by the Government vested in petitioner, which had a perfect right to use and treat it as its own funds without regard to any future claim for return that might be made by the United States. In this connection it is well to point out that substantially two years elapsed after the receipt of this sum by petitioner before the Interstate Commerce Commission attempted to revoke its order and cancelled the claim of the petitioner. (R. 2.)

Upon receipt of the sum in question petitioner dealt with it properly. It paid the expenses incident to the successful prosecution of its claim; it paid out other sums for taxes and in the operation and maintenance of its railroad, and it distributed out of the moneys so received by way of dividends a large sum to its stockholders. All these amounts so paid out and distributed have been lost to petitioner.

Where a city purchased the plant of a water company and the company thereupon distributed the money to the stockholders, and it was discovered that by mistake the city had paid the company $2,000.00 in excess of the agreed

price, the Court held that, the stockholders having rightfully received the money, it could not be recovered. The Court said:

> "It is true that the assets of a company cannot ordinarily be divided among those entitled until the corporate existence ceases, since they constitute a trust fund for the protection of creditors, and an attempt to improperly divert the funds of the continuing organization may be restrained. (Citing cases.) But payments clearly not intended to defraud, but delivered in good faith, when the company is believed to be solvent, no rights of the creditors being impaired, are proper. (Citing cases.) Distributions mistakenly made may be retained as against subsequent creditors. * * * It is true that money paid by mistake may be recovered back, even though the one making it may have been negligent * * *, but this is not so when the position of the parties has in the meantime been changed."
>
> Borough of Mount Union *v.* Kunz, 139 Atl. (Pa.), 118, 120.

To the same effect:

> Atlantic Coast Line R. Co. *v.* Schirmer, 69 S. E. (S. C.), 439, 440.

In *Walker* v. *United States*, 139 Fed. 409 (Aff'd 148 Fed. 1022), it was held that where a marshal has in good faith rendered accounts against the United States, covering service of his deputies, which have been audited and allowed by the proper accounting officers, and paid in accordance with the rules which had previously been recognized as governing such allowances and with knowledge that the greater part of the money would be paid over to

the deputies rendering the services, the Government is not entitled to recover the sum so paid the marshal, after years have elapsed and he has gone out of office, even though the allowance may have been made under an erroneous construction of the law. The Court said at page 413:

> "The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject-matter between man and man."

In view of the recent decision of this Court in the case of *Continental Tie & Lumber Company* v. *United States*, 286 U. S. 290, that the award under Section 204 is income, constituting reimbursement to short line railroads for losses sustained by reason of government control of railroads, the loss being recognized and the moral obligation being fulfilled, in equity and good conscience petitioner should retain the reimbursement awarded and the Government should not be permitted to recover back the money paid.

The loss to petitioner, for which it was reimbursed, is just as much a loss, though a decrease in railway operating income during the Federal control period as compared to the test period, as if solely a loss during the Federal control period.

The equities in the instant case are wholly in favor of petitioner and against the United States. There is no way known to the law in this character of action by which petitioner can be placed in *statu quo* in face of the allegations contained in its amended answer and such being the case

the answer states a complete defense to the claim of the Government.

Appropriate here on this subject is the language of the court in *Hilborn* v. *United States,* 27 Ct. Cls., 547 (affirmed in 163 U. S. 342), which deals with the right of the Government to recover back fees paid to a district attorney because of an erroneous interpretation of a statute. In denying the right of the Government to recover the payment, the Court said:

> *"In our opinion when money is paid after careful consideration of the law and facts by such high officials and upon settlements made by the accounting officers it cannot be held that the district attorney received money under such circumstances that in equity and good conscience he ought not to retain it although it may appear that all these public officers were mistaken in their interpretation of the statutes and that he was not in law entitled to the compensation."* (Italics ours.)

The money in controversy *ex aequo et bono* does not belong to the Government; it belongs to the petitioner.

6. THE PAYMENT OF THE MONEY TO PETITIONER WAS THE RESULT OF A COMPROMISE AND SETTLEMENT.

The Circuit Court of Appeals herein held (R. 92):

> "The added contention of appellant that the settlement made was one of compromise does not make a different case because the railroad company was not entitled to any amount under the facts as admitted."

This Court has held in the case of *United States* v. *Justice,* 81 U. S. 535, 549, that:

"It is always in the power of parties to compromise their differences. One way of doing this is by arbitrators, mutually chosen, but from such submission neither party is at liberty to withdraw after the award is made. The condition of the Government creditor is better than this, for if dissatisfied with the allowance made him by the commission, he can refuse to receive it, or can accompany his receipt of it, if he chooses to take it, with a proper protest. This protest is necessary to inform the Government that the compromise is rejected, and that this rejection leaves the claimant free to litigate the matter in dispute before the Court of Claims. If with this knowledge and under these circumstances the money is paid, there can be no just cause of complaint *on either side,* and the status of the parties is not affected by anything which transpired before the commission." (Italics ours.)

Had this controversy arisen between individuals there would not have been the slightest basis for the maintenance of this action.

The first affirmative defense (R. 42) rests upon the proposition that petitioner filed its claim under Section 204 before the Interstate Commerce Commission in the sum of $600,527.35 and demanded a finding allowing the same in that amount and certification thereof to the Treasury of the United States for payment; that thereafter the Government after investigating the claim of petitioner made an offer of compromise in the language set forth in the amended answer (R. 44-45); that to this offer of compromise was attached a blank form of acceptance to be executed by petitioner which provided that the latter should accept the offer so made "in settlement of all claims

against the Government under said Section 204" (R. 46); that petitioner executed said acceptance and release and as a result of such offer of compromise and acceptance and release, the United States paid to petitioner the sum of $487,116.31, petitioner having released its claim of upwards of $112,000 in excess of the amount received.

No more direct, positive example of compromise and settlement could possibly be imagined and, under the law as between private individuals, no doubt could arise as to the right of the petitioner to retain the money so received.

And, as previously shown, the rule is well recognized and has been frequently stated by this Court that, with few exceptions, rules of law apply to the Government and individuals alike; there is not one law for the former and another for the latter.

This defense has its foundation in that principle of the law which is stated as follows:

> "With the courts of this country, the prevention of litigation is not only a sufficient, but a highly favored consideration; and no investigation into the character or value of the different claims submitted will be entered into for the purpose of setting aside a compromise, it being sufficient if the parties entering into the compromise thought at the time that there was a question between them.
>
> "So giving up a suit or any *equivalent proceedings*, instituted to try a question of which the legal result is doubtful, is a good consideration for a promise to pay a sum of money for an abandonment thereof. And in these cases inequality of consideration does not constitute a valid objection; it is enough if there be an actual controversy, of which the issue may fairly be considered by both parties as doubtful." (Italics ours.)

Parsons on Contracts, Ninth Edition, Vol. 1, page 477.

To the same effect:

Kiefer Oil & Gas Co. *v.* McDougal, 229 Fed. 933.

This rule was followed in considering a claim arising under the Dent Act (War Minerals Relief Act, 40 Stat. 1272), where the Court of Claims used the following language:

"The conclusive character of an award by the Secretary and acceptance by the claimant was considered by this Court in Delaine Mills *v.* United States, 57 Ct. Cls., 453; and although that was an attempt by a claimand to secure further relief, and its right to further proceed in this court was under consideration, it was pertinently said by the Chief Justice, speaking for the court: 'But when the matter has been presented to the Secretary, or the board organized by him to hear and consider it, and an adjustment is offered and accepted as in this instance, there is no basis for further proceedings in the Court of Claims. A salutary purpose of the Dent Act was to produce adjustments and settlements of a specified character of claims and not merely to produce or foster litigation. If the party accept the award, the purpose of the act is accomplished, and there is no need of further litigation.' See Nassau Smelting & Refining Works, Ltd., *v.* United States, decided by the Supreme Court, November 17, 1924 (266 U. S. 101).

"A claimant being estopped from any further remedy by acceptance of an award, a theory which was invoked by the government in the Delaine Mills case, it seems but a just application of the same principle

to hold the Government equally bound, unless, of course, it has been 'defrauded'."

Standard Steel Car Co. *v.* United States, 60 Ct. Cls. 726.

In the case of *D'Olier Engineering Co.* v. *United States,* 244 Fed. 90, the Circuit Court of Appeals for the Third Circuit had under consideration a settlement made by the Government with the plaintiff in connection with the furnishing of boilers in the plants of the Panama Canal. It appears that the Government was to pay a stipulated price for the boilers, based among other things on a rating of 72 per cent. efficiency. After the installation of the boilers, a test was to be made by a Government engineer and a representative of the plaintiff and settlement made thereon. An admitted mistake was made by the engineers, and the boilers were overrated to the extent that the plaintiff was overpaid some thousands of dollars more than it would have been had the rating been made in accordance with the contract. An action was brought by the Government to recover the amount so paid. The lower court, while recognizing the principle of compromise, found that the money was not paid "in compromise of a claim in dispute" and authorized a recovery on the part of the Government. On appeal the Circuit Court of Appeals vacated the judgment and said:

"It will thus be noted that this action at law while in form for the recovery of money mistakenly paid under the contract of November 17, 1908, is in reality the annulling of the settlement of February 28, 1910, so made by the parties, of all matters in dispute under said contract. This suit is not to enforce any contract, express or implied, but it seeks to invalidate a settlement contract that has already been performed, and

that without either the willingness expressed or the power possessed to restore the parties to their previous status. By this suit, the Government forecloses and excludes all those equitable considerations and plastic powers which a chancellor could exercise were this a bill to rescind the agreement of settlement."

D'Olier Engineering Co. *v.* United States, 244 Fed. 90, 94.

If the petitioner was not entitled to the money awarded to it by virtue of this compromise and settlement, the Government has pursued the wrong remedy. This is an action at law and, in the language of the Circuit Court of Appeals in the *D'Olier Engineering Case* (244 Fed. 90, 94):

> "By this suit the government forecloses and excludes all those equitable considerations and plastic powers which a chancellor could exercise were this a bill to rescind the agreement of settlement."

In other words, if the Government has any remedy in the premises, it must seek relief in a court of equity where the court, in the exercise of its equitable powers in a proper case, may set aside the settlement, and the award made pursuant thereto, and then proceed to do equity between the parties.

It is the universal rule that settlements and awards, as well as judgments, even though erroneously made or entered, cannot be ignored and an action at law maintained to rectify the error by collateral attack. A court of equity must be appealed to in order that the settlement, award or judgment, as the case may be, may be first set aside.

The binding effect of compromise and settlement of claims in dispute between citizens and the Government is universally recognized.

United States *v.* Koplin, 24 Fed. (2d), 840;
United States *v.* Justice, 81 U. S. 535, 546, 549;
City of St. Louis *v.* United States, 92 U. S. 462, 466;
United States *v.* Chouteau, 102 U. S. 603, 610, 611;
Wells *v.* Nichols, 104 U. S. 444, 448;
Mason *v.* United States, 84 U. S. 67, 70;
United States *v.* Child & Co., 79 U. S. 232, 240;
United States *v.* Adams, 74 U. S. 463, 478.

In *City of St. Louis* v. *United States,* 92 U. S. 462, 466, this Court concludes its opinion with the following pertinent statement, equally applicable herein:

> "In short, we are of opinion that the deed of Carondelet is valid, as based upon an equitable compromise of a long-pending and doubtful question of title, and that it excludes the plaintiff in this suit from any relief."

Petitioner's argument is summarized in the language of the Court of Claims in the case of *Standard Steel Car Co.* v. *United States,* 60 Court of Claims 726, which arose under the Dent Act (Chapter 94, 40 Stats. 1272):

> "It is contended that the action set up in the counterclaim is not one to set aside the award made by the Secretary of War, and while it is entirely true that the relief sought is not so in terms pleaded it is sought to recover the amount, or very nearly the entire amount, two items being excepted, *awarded to the plaintiff by the Secretary of War, paid pursuant to that award, and accepted by the plaintiff in satisfaction of its claim,* and even though it be not prayed that the award be set aside, that must undoubtedly be the effect of the rendition of a judgment for the recovery

of the amount awarded and paid. *A determination of the merits of the counterclaim on the facts must necessarily involve a 'review'* (*a word found in the statute*) of the award, and if a judgment for the recovery of the money awarded and paid could be rendered without having the effect of setting aside the award, even though not so decreed in terms, the plaintiff would remain the beneficiary of an award duly accepted and paid but converted into an anomalous sort of a *nudum pactum* by the requirements that it surrender the fruits. *We cannot escape the effect of an action by contention as to the name with which we will christen* it." (Italics ours.)

The effect of permitting the Government to recover herein would be to set aside the compromise, settlement, and award of the Commission.

To permit a recovery here would also render nugatory the binding effect of the certification by the Commission under which petitioner was paid; it would take from petitioner the fruits of that decision and leave it in the position of having obtained the decision without the right to retain the advantage thereof.

CONCLUSION.

It is respectfully submitted that:

The Circuit Court of Appeals erred in construing subdivision (a) of Section 204 of the Transportation Act.

Regardless of the proper interpretation to be given to subdivision (a) of Section 204, the decision of the special tribunal to whom Congress committed the administration of this Act, is final and conclusive, and not subject to review.

The Circuit Court of Appeals erred in deciding that the Government can recover the money paid to petitioner as reimbursement and not as a subsidy or bonus. The same rule applies herein where the Government is a party as between individuals, and *ex aequo et bono* the money belongs to petitioner, and the Government should not be permitted to recover it back.

The Circuit Court of Appeals erred in deciding that the Government can disregard the compromise and settlement herein and sue for money had and received.

It is, therefore, respectfully urged that this Court reverse the decision and judgment of the Circuit Court of Appeals for the Ninth Circuit herein.

Respectfully submitted,

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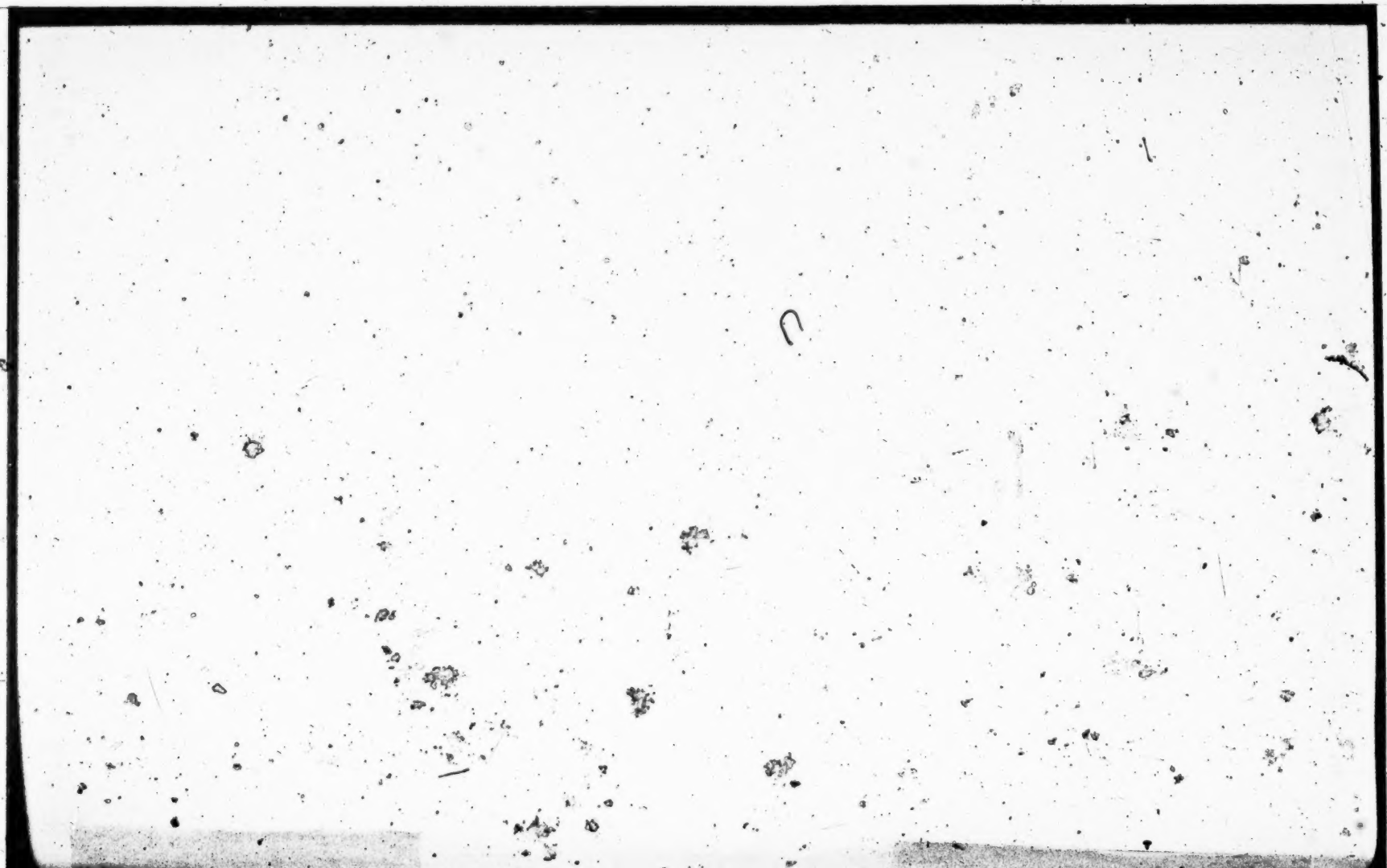

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.
No. 768

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA.

APPENDIX TO BRIEF OF PETITIONER BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, A CORPORATION, ON THE MERITS.

(Extract.)

(Public—No. 242—64th Congress.)

(H. R. 17498.)

An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the support of the Army for the year ending June thirtieth, nineteen hundred and seventeen. * * *

The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for

such other troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable. * * *

(Extract.)

By The President of the United States of America.

A PROCLAMATION.

* * * * * *

And whereas it has now become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same, to the exclusion, as far as may be necessary, of other than war traffic thereon, for the transportation of troops, war material, and equipment therefor, and for other needful, and desirable purposes connected with the prosecution of the war;

Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary War, take possession and assume control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation, whether operated by steam or by electric power, including, also terminals, terminal companies, terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail-and-water systems of transportation; to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material, and equipment, to the exclusion so

far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

It is hereby directed that the possession, control, operation, and utilization of such transportation systems, hereby by me undertaken, shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers, and employees of said systems of transportation. Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies.

Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders general or special, hereafter made by said director shall have paramount authority and be obeyed as such.

* * * * *

The director shall, as soon as may be after having assumed such possession and control, enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use, and control of their respective properties on the basis of an annual guaran-

teed compensation above accruing depreciation and the maintenances of their properties equivalent, as nearly as may be, to the average of the net, operating income thereof for the three-year period ending June 30, 1917, the results of such negotiations to be reported to me for such action as may be appropriate and lawful.

But nothing herein contained, expressed or implied, or hereafter done or suffered hereunder, shall be deemed in any way to impair the rights of the stockholders, bondholders, creditors, and other persons having interests in said systems of transportation or in the profits thereof to receive just and adequate compensation for the use and control and operation of their property hereby assumed.

* * * * *

From and after 12 o'clock on said 28th day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice. But for the purpose of accounting said possession and control shall date from 12 o'clock midnight on December 31, 1917.

(Extract.)

Statement of the President.

I have exercised the powers over the transportation systems of the country which were granted me by the act of Congress of last August because it has become imperatively necessary for me to do so. This is a war of resources no less than of men, perhaps even more than of men, and it is necessary for the complete mobilization of our resources that the transportation systems of the country should be organized and employed under a single authority and a simplified method of coordination which have not proved possible under private management and control. The committee of railway executives who have been cooperating with the Government in this all-important matter have done the utmost that it

was possible for them to do; have done it with patriotic zeal and with great ability; but there were difficulties that they could neither escape nor neutralize. Complete unity of administration in the present circumstances involves upon occasion and at many points a serious dislocation of earnings, and the committee was, of course, without power or authority to rearrange charges or effect proper compensations and adjustments of earnings. Several roads which were willingly and with admirable public spirit accepting the orders of the committee have already suffered from these circumstances and should not be required to suffer further. In mere fairness to them the full authority of the Government must be substituted. The Government itself will thereby gain an immense increase of efficiency in the conduct of the war and of the innumerable activities upon which its successful conduct depends.

The public interest must be first served and, in addition, the financial interests of the Government and the financial interests of the railways must be brought under common direction. The financial operations of the railways need not then interfere with the borrowings of the Government, and they themselves can be conducted at a greater advantage. Investors in railway securities may rest assured that their rights and interests will be as scrupulously looked after by the Government as they could be by the directors of the several railway systems. Immediately upon the reassembling of Congress I shall recommend that these definite guarantees be given: First, of course, that the railway properties will be maintained during the period of Federal control in as good repair and as complete equipment as when taken over by the Government; and, second, that the roads shall receive a net operating income equal in each case to the average net income of the three years preceding June 30, 1917; and I am entirely confident that the Congress will be disposed in this case, as in others, to see that justice is done and full security

assured to the owners and creditors of the great systems which the Government must now use under its own direction or else suffer serious embarrassment.

(Public—No. 107—65th Congress.)

(S. 3752.)

An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes. (Federal Control Act.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.

That any railway operating income accruing during the period of Federal control in excess of such just compensation shall remain the property of the United States. In the computation of such income, debits and credits arising from the accounts called in the monthly reports to the Interstate Commerce Commission equipment, rents and joint facility rents shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are at the time of the agreement not under Federal control, shall be excluded. If any lines were acquired by, leased to, or consolidated with

such railroad or system between July first, nineteen hundred and fourteen, and December thirty-first, nineteen hundred and seventeen, both inclusive, and separate operating returns to the Interstate Commerce Commission were not made for such lines after such acquisition, lease, or consolidation, there shall (before the average is computed) be added to the total railway operating income of such railroad or system for the three years ended June thirtieth, nineteen hundred and seventeen, the total railway operating income of the lines so acquired, leased or consolidated, for the period beginning July first, nineteen hundred and fourteen, and ending on the date of such acquisition, lease, or consolidation, or on December thirty-first, nineteen hundred and seventeen, whichever is the earlier. The average annual railway operating income shall be ascertained by the Interestate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.

Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenues derived

from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation.

Every such agreement shall also contain adequate and appropriate provisions for the maintenance, repair, renewals and depreciation of the property, for the creation of any reserves or reserve funds found necessary in connection therewith, and for such accounting and adjustments of charges and payments, both during and at the end of Federal control as may be requisite in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control, and also that the United States may, by deductions from the just compensations or by other proper means and charges be reimbursed for the cost of any additions, repairs, renewals, and betterments to such property not justly chargeable to the United States; in making such accounting and adjustments, due consideration shall be given to the amounts expended or reserved by each carrier for maintenance, repairs, renewals, and depreciation during the three years ended June thirtieth, nineteen hundred and seventeen, to the condition of the property at the beginning and at the end of Federal control and to any other pertinent facts and circumstances.

The President is further authorized in such agreement to make all other reasonabde provisions, not inconsistent with the provisions of this Act or of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, that he may deem necessary or proper for such Federal control or for the determination of

the mutual rights and obligations of the parties to the agreements arising from or out of such Federal control.

If the President shall find that the condition of any carrier was during all or a substantial portion of the period of three years, ended June thirtieth, nineteen hundred and seventeen, because of nonoperation, receivership, or where recent expenditures for additions or improvements or equipment were not fully reflected in the operating railway income of said three years or a substantial portion thereof, or because of any undeveloped or abnormal conditions, so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just.

That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control", as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: *Provided, however,* That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both.

The agreement shall also provide that the carrier shall accept all the terms and conditions of this act and any regulation or order made by or through the President under authority of this act or of that portion of the act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and

seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, which authorizes the President in time of war to take possession, assume control, and utilize systems of transportion.

Sec. 2. That if no such agreement is made, or pending the execution of an agreement, the President may nevertheless pay to any carrier while under Federal control an annual amount, payable in reasonable installments, not exceeding ninety per centum of the estimated annual amount of just compensation, remitting such carrier, in case where no agreement is made, to its legal rights for any balance claimed to the remedies provided in section three hereof. Any amount thereafter found due such carrier above the amount paid shall bear interest at the rate of six per centum per annum. The acceptance of any benefits under this section shall constitute an acceptance by the carrier of all provisions of this Act and shall obligate the carrier to pay to the United States, with interest at the rate of six per centum per annum from a date or dates fixed in proceedings under section three, the amount by which the sums received under this section exceed the sum found due in such proceedings.

Sec. 3. That all claims for just compensation not adjusted (as provided in section one) shall, on the application of the president or of any carrier, be submitted to boards, each consisting of three referees to be appointed by the Interstate Commerce Commission, members of which and the official force thereof being eligible for service on such boards without additional compensation. Such boards of referees are hereby authorized to summon witnesses, require the production of records, books, correspondence, documents, memoranda, and other papers, view properties, administer oaths, and may hold hearings in Washington and elsewhere, as their duties and the convenience of the parties may require. In case of disobedience to a subpoena the board may invoke the aid of any district court of the United States in requiring the

attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, corporation, partnership, or association, issue an order requiring appearance before the board, or the production of documentary evidence if so ordered, or the giving of evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. Such cases may be heard separately or together or by classes, by such boards as the Interstate Commerce Commission in the first instance, or any board of referees to which any such cases shall be referred may determine. Said boards shall give full hearings to such carriers and to the United States; shall consider all the facts and circumstances, and shall report as soon as practicable in each case to the President the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section one. The President is authorized to enter into an agreement with such carrier for just compensation upon a basis not in excess of that reported by such board, and many include therein provisions similar to those authorized under section one. Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated. Proceedings in the Court of Claims under this section shall be given precedence and expedited in every particular way.

Sec. 4. That the just compensation that may be determined as hereinbefore provided by agreement or that may be adjudicated by the Court of Claims, shall be increased by an amount reckoned at a reasonable rate per centum to be fixed

by the President upon the cost of any additions and betterments, less retirements, and upon the cost of road extensions to the property of such carrier made by such carrier with the approval of or by order of the President while such property is under Federal control.

Sec. 5. That no carrier while under Federal control, shall without the prior approval of the President, declare or pay any dividend in excess of its regular rate of dividends during the three years ending June thirtieth, nineteen hundred and seventeen; *Provided, however,* That such carriers as have paid no regular dividends or no dividends during said period may, with the prior approval of the President, pay dividends at such rate as the President may determine.

Sec. 6. That the sum of $500,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, which, together with any funds available from any operating income of said carriers, may be used by the President as a revolving fund for the purpose of paying the expenses of the Federal control, and so far as necessary the amount of just compensation, and to provide terminals, motive power, cars, and other necessary equipment, such terminals, motive power, cars, and equipment to be used and accounted for as the President may direct and to be disposed of as Congress may hereafter by law provide.

The President may also make or order any carrier to make any additions, betterments, or road extensions, and to provide terminals, motive power, cars, and other equipment necessary or desirable for war purposes or in the public interest on or in connection with the property of any carrier. He may from said revolving fund advance to such carrier all or any part of the expense of such additions, betterments, or road extensions, and to provide terminals, motive power, cars, and other necessary equipment so ordered and constructed by such carrier or by the President, such advances to be charged against such carrier and to bear interest at such rate and be

payable on such terms as may be determined by the President, to the end that the United States may be fully reimbursed for any sums so advanced.

Any loss claimed by any carrier by reason of any such additions, betterments, or road extensions so ordered and constructed may be determined by agreement between the President and such carrier; failing such agreement the amount of such loss shall be ascertained as provided in section three hereof.

From said revolving fund the President may expend such an amount as he may deem necessary or desirable for the utilization and operations of canals, or for the purchase, construction, or utilization and operation of boats, barges, tugs, and other transporation facilities on the inland, canal, and coastwise waterways, and may in the operation and use of such facilities create or employ such agencies and enter into such contracts and agreements as he shall deem in the public interest.

Sec. 7. That for the purpose of providing funds requisite for maturing obligations or for other legal and proper expenditures, or for reorganizing railroads in receivership, carriers may, during the period of Federal control, issue such bonds, notes, equipment trust certificates, stock, and other forms of securities, secured or unsecured by mortgage, as the President may first approve as consistent with the public interest. The President may, out of the revolving fund created by this act, purchase for the United States all or any part of such securities at prices not exceeding par, and may sell such securities whenever in his judgment it is desirable at prices not less than the cost thereof. Any securities so purchased shall be held by the Secretary of the Treasury, who shall, under the direction of the President, represent the United States in all matters in connection therewith in the same manner as a private holder thereof. The President shall each each year as soon as practicable after January first, cause a

detailed report to be submitted to the Congress of all receipts and expenditures made under this section and section six during the preceding calendar year.

Sec. 8. That the President may execute any of the powers herein and heretofore granted him with relation to Federal control through such agencies as he may determine, and may fix the reasonable compensation for the performance of services in connection therewith, and may avail himself of the advice, assistance, and cooperation of the Interstate Commerce Commission and of the members and employees thereof, and may also call upon any department, commission, or board of the Government for such services as he may deem expedient. But no such official or employee of the United States shall receive any additional compensation for such services except as now permitted by law.

Sec. 9. That the provisions of the act entitled "An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this act; and the President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred. The provisions of this act shall also apply to any carriers to which Federal control may be hereafter extended.

Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and

in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be transferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control.

That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations and practices shall not be suspended by the commission pending final determination.

Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportaion systems are being operated under a unified and coordinated national control and not in competi-

tion.

After full hearing the commission may make such findings and orders as are authorized by the act to regulate commerce as amended and said findings and orders shall be enforced as provided in said act: *Provided, however,* That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accrusals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make.

Sec. 11. That every person or corporation, whether carrier or shipper, or any receiver, trustee, lessee, agent, or person acting for or employed by a carrier or shipper, or other person, who shall knowingly violate or fail to observe any of the provisions of this act, or shall knowingly interfere with or impede the possession, use, operation, or control of any railroad property, railroad, or transportation system hitherto or hereafter taken over by the President, or shall knowingly violate any of the provisions of any order or regulation made in pursuance of this act, shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not more than $5,000, or, if a person, by imprisonment for not more than two years, or both. Each independent transaction constituting a violation of, or a failure to observe, any of the provisions of this act, or any order entered in pursuance hereof, shall constitute a separate offense. For the taking or conversion to his own use or the embezzlement of money or property derived from or used in connection with the possession,

use, or operation of said railroads or transportation systems, the criminal statutes of the United States, as well as the criminal statutes of the various States where applicable, shall apply to all officers, agents, and employees, engaged in said railroad and transportation service, while the same is under Federal control, to the same extent as to persons employed in the regular service of the United States. Prosecutions for violations of this act or of any order entered hereunder shall be in the district courts of the United States, under the direction of the Attorney General, in accordance with the procedure for the collection and imposing of fines and penalties now existing in said courts.

Sec. 12. That moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States. Unless otherwise directed by the President, such moneys shall not be covered into the Treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before Federal control. Disbursements therefrom shall, without further appropriation, be made in the same manner as before Federal control and for such purposes as under the Interstate Commerce Commission classification of accounts in force on December twenty-seventh, nineteen hundred and seventeen, are chargeable to operating expenses or to railway tax accruals and for such other purposes in connection with Federal control as the President may direct, except that taxes under Titles One and Two of the act entitled "An Act to provide revenue to defray war expenses, and for other purposes," approved October third, nineteen hundred and seventeen, or any act in addition thereto or in amendment thereof, shall be paid by the carrier out of its own funds. If Federal control begins or ends during the tax year for which any taxes so chargeable to railway tax accruals are assessed, the taxes for such year shall be apportioned to the date of the beginning

or ending of such Federal control, and disbursements shall be made only for that portion of such taxes as is due for the part of such tax year which falls within the period of Federal control.

At such periods as the President may direct, the books shall be closed and the balance of revenues over disbursements shall be covered into the Treasury of the United States to the credit of the revolving fund created by this act. If such revenues are insufficient to meet such disbursements, the deficit shall be paid out of such revolving fund in such manner as the President may direct.

Sec. 13. That all pending cases in the courts in the United States affecting railroads or other transportation systems brought under the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended and supplemented, including the commodities clause, so called, or under the act to protect trade and commerce against unlawful restraints and monopolies, approved July second, eighteen hundred and ninety, and amendments thereto, shall proceed to final determination as soon as may be, as if the United States had not assumed control of transportation systems; but in any such case the court having jurisdiction may, upon the application of the United States, stay execution of final judgment or decree until such time as it shall deem proper.

Sec. 14. That the Federal control of railroads and transportation systems herein and heretofore provided for shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace; *Provided, however,* That the President may, prior to July first, nineteen hundred and eighteen, relinquish control of all or any part of any railroad or system of transportation, further Federal control of which the President

shall deem not needful or desirable; and the President may at any time during the period of Federal control agree with the owners thereof to relinquish all or any part of any railroad or system of transportation. The President may relinquish all railroads and systems of transportation under Federal control at any time he shall deem such action needful or desirable. No right to compensation shall accrue to such owners from and after the date of relinquishment for the property so relinquished.

Sec. 15. That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds.

Sec. 16. That this act is expressly declared to be emergency legislation enacted to meet conditions growing out of war; and nothing herein is to be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of carriers or the method or basis of the capitalization thereof.

Approved, March 21, 1918.

By The President of the United States of America,

A PROCLAMATION.

Authorizing the Director General of Railroads to Exercise Powers conferred on the President by Congress.

Whereas, by the proclamation dated December 26, 1917, taking over each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States, it was provided "that the possession, control, operation, and untilization of such transportation systems hereby by me undertaken, shall be exercised by and through William G. McAdoo, who is here-

by appointed and designated Director General of Railroads," and the said William G. McAdoo pursuant to said proclamation entered upon and has continued to discharge the duties of Director General of Railroads as provided therein; and

Whereas, since the issuance of said proclamation the Congress of the United States has passed an act entitled *An Act to Provide for the Operation of Transportation Systems while under Federal Control, for the Just Compensation of their Owners, and for other Purposes,* which act was duly approved by me on the 21st day of March, 1918, and is now in full force and effect; and in terms confers upon the President the powers specified therein and the authority to carry the same into effect; and

Whereas, it is provided in Section 8 of said act that the President may execute any of the powers therein and theretofore granted him with relation to the Federal control of systems of transportation and parts thereof, including railroads, inland waterways, etc., through such agencies as he may determine;

Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers and authority so vested in me by said act and of all other powers me hereto enabling, do hereby authorize the said William G. McAdoo, Director General of Railroads as aforesaid, either personally or through such divisions, agencies, or persons as he may appoint, and in his own name or in the name of such divisions, agencies, or persons, or in the name of the President to agree with the carriers or any of them or with any other person in interest, upon the amount of compensation to be paid pursuant to law, and to sign, seal, and deliver in his own name or in the name of the President or in the name of the United States such agreements as may be necessary and expedient with the several carriers or other persons in interest respecting compensation, or any other matter concerning which it may be necessary or expedient to deal and

to make any and all contracts, agreements, or obligations necessary or expedient and to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular all acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia this 29th day of March in the year of our Lord, one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-second.

(SEAL) WOODROW WILSON.

By the President:

Robert Lansing,

Secretary of State.

TRANSPORTATION ACT 1920

AN ACT To provide for the termination of Federal control of railroads and systems of transportation; to provide for the settlement of disputes between carriers and their employees; to further amend an Act entitled "An Act to regulate commerce," approved February 4, 1887, as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

TITLE I—Definitions

Section 1. This Act may be cited as the "Transportation Act, 1920."

Sec. 2. When used in this Act—

The term "Interstate Commerce Act" means the Act entitled "An Act to regulate commerce," approved February 4, 1887, as amended;

The term "Commerce Court Act" means the Act entitled "An Act to create a commerce court, and to amend an act entitled 'An Act to regulate commerce,' approved February 4, 1887, as heretofore amended, and for other purposes," approved June 18, 1910;

The term "Federal Control Act" means the Act entitled "An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes," approved March 21, 1918, as amended;

The term "Federal control" means the possession, use, control, and operation of railroads and systems of transportation, taken over or assumed by the President under section 1 of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916, or under the Federal Control Act; and

The term "Commission" means the Interstate Commerce Commission.

TITLE II—TERMINATION OF FEDERAL CONTROL.

Sec. 200. (a) Federal control shall terminate at 12:01 a. m., March 1, 1920; and the President shall then relinquish possession and control of all railroads and systems of transportation then under Federal control and cease the use and operation thereof.

* * * * * * *

Reimbursement of Deficits During Federal Control.

Sec. 204. (a) When used in this section.

The term "carrier" means a carrier by railroad which, during any part of the period of Federal control, engaged as a

common carrier in general transportation, and competed for traffic or connected, with a railroad under Federal control, and which sustained a *deficit in its railway operating income* for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation; but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; and

The term "test period" means the three years ending June 30, 1917.

(b) For the purposes of this section—

Railway operating income or any deficit therein for the period of federal control shall be computed in a manner similar to that provided in section 209 with respect to such income or deficit for the guaranty period; and

Railway operating income or any deficit therein for the test period shall be computed in the manner provided in section 1 of the Federal Control Act.

(c) As soon as practicable after March 1, 1920, the Commission shall ascertain for every carrier, for every month of the period of Federal Control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if any (hereinafter called "Federal control return"), and the average of its deficit in railway operating income, if any, and of its railway operating income, if any, for the three corresponding months of the test period taken together (hereinafter called the "test period return"): *Provided* That "test period return," in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during

the test period taken together, during which the carrier operated its railroad or system of transportation.

(d) For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the Commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, or (2) *the difference between its test period return, if an income, and its Federal control return, if a smaller income, or* (3) the sum of its Federal control return if a deficit, plus its test period return, if an income. *The sum of such amounts shall be credited to the carrier.*

(e) For every such month the Commission shall then ascertain (1) *the difference between the carrier's Federal control return, if an income, and its test period return, if a smaller income,* or (2) the difference between its test period return, if a deficit, and its Federal control return, if a smaller deficit, or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit. The sum of such amounts shall be credited to the United States.

(f) If the sum of the amounts so credited to the carrier under subdivision (d) exceeds the sum of the amounts so credited to the United States under subdivision (e), *the difference shall be payable to the carrier.* In the case of a carrier which operated its railroad or system of transportation for less than a year during, or for none of, the test period, the foregoing computation shall not be used, but there shall be payable to such carrier its deficit in railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad system of transportation.

(g) The Commission shall promptly certify to the Secretary of the Treasury the several amounts payable to carriers under paragraph (f). The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants

in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

* * * * * *

Guaranty to Carriers After Termination of Federal Control.

Sec. 209. (a) When used in this section—

The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban or interurban passenger traffic or sale of power, heat, and light, or both;

The term "guaranty period" means the six months beginning March 1, 1920.

The term "test period" means the three years ending June 30, 1917; and

The term "railway operating income" and other references to accounts of carriers by railroad shall, in the case of a sleeping car company, be construed as indicating the appropriate corresponding accounts in the accounting system prescribed by the Commission.

(b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.

(c) The United States hereby guarantees—

(1) With respect to any carrier with which a contract (exclusive of so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increases in such compensation provided for in seciton 4 of the Federal Control Act;

(2) With respect to any carrier entitled to just compensation under the Federal Control Act, with which such a contract has not been made, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half of the annual amount estimated by the President as just compensation for such carrier under the Federal Control Act, including the increases in such compensation provided for in section 4 of the Federal Control Act. If any such carrier does not accept the President's estimate respecting its just compensation, and if in proceedings under section 3 of the Federal Control Act it is determined that a larger or smaller annual amount is due as just compensation, the guaranty under this paragraph shall be increased or decreased accordingly;

(3) With respect to any carrier, whether or not entitled to just compensation under the Federal Control Act, with which such a contract has not been made, and for which no estimate of just compensation is made by the President, and which for the test period as a whole sustained a deficit in railway operating income, the guaranty shall be a sum equal

to (a) the amount by which any deficit in its railway operating income for the guaranty period as a whole exceeds one-half of its average annual deficit in railway operating income for the test period, plus (b) an amount equal to one-half the annual sum fixed by the President under section 4 of the Federal Control Act;

(4) With respect to any carrier not entitled to just compensation under the Federal Control Act, which for the test period as a whole had an average annual railway operating income, that the railway operating income of such carrier for the guaranty period as whole shall not be less than one-half the average annual railway operating income of such carrier during the test period.

(d) If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (1), (2), or (4) of subdivision (c) is in excess of the minimum railway operating income guaranteed in such paragraph, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (3) of subdivision (c) is in excess of one-half of the annual sum fixed by the President with respect to such carrier under section 4 of the Federal Control Act, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. The amounts so paid into the Treasury of the United States shall be added to the funds made available under section 202 for the purposes indicated in such section. Notwithstanding the provisions of this subdivision, any carrier may retain out of any such excess any amount necessary to enable it to pay its fixed charges accruing during the guaranty period.

(e) For the purposes of this section railway operating income, or any deficit therein, for the test period shall be computed in the manner provided for in section 1 of the Fed-

eral Control Act.

(f) In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section—

(1) Debits and credits arising from the accounts, called in the monthly reports to the Commission, equipment, rents and joint facility rents, shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are not under Federal control at the time of termination thereof, shall be excluded;

(2) Proper adjustments shall be made (a) in case of any lines which were, during any portion of the period of Federal control, a part of the railroad or system of transportation of the carrier, and whose railway operating income was included in such income of the carrier for the test period, do not continue to be a part of such railroad or system of transportation during the entire guaranty period, and (b) in case of any lines acquired by, leased to, or consolidated with, the railroad or system of transportation of the carrier at any time since the end of the test period and prior to the expiration of the guaranty period, for which separate operating returns to the Commission are not made in respect to the entire portion of the guaranty period;

(3) There shall not be included in operating expenses, for maintenance of way and structure, or for maintenance of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in paragraph (a) of section 5 of the "standard contract" between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed);

(4) There shall not be included any taxes paid under Title I or II of the Revenue Act of 1917, or such portion of the

taxes paid under Title II or III of the Revenue Act of 1918 as by the terms of such Act are to be treated as levied by an Act in amendment of Title I or II of the Revenue Act of 1917; and

(5) The Commission shall require the elimination and restatement of the operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the

carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

(i) If the American Railway Express Company shall, on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this subdivision, the contract of June 26, 1918, between such company and the Director General of Railroads, as amended and continued by agreement dated November 21, 1918, shall remain in full force and effect during the guaranty period in so far as the same constitutes a guaranty on the part of the United States to such company against a deficit in operating income.

In computing operating income, and any deficit therein, for the guaranty period for the purposes of this subdivision, the Commission shall require the elimination and restatement of the operating expenses and revenues for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period, and to exclude from the operating expenses so much of the charge for payment for express privileges to carriers on whose lines the express traffic is carried as is in excess of 50.25 per centum of gross express revenue.

For the guaranty period the American Railway Express Company shall pay to every carrier which accepts the provi-

sions of this section, as provided in subdivision (b), hereof, 50.25 per centum of the gross revenue earned on the transportation of all its express traffic on the carrier's lines, and every such carrier shall accept from the American Railway Express Company such percentage of the gross revenue as its compensation. In arriving at the gross revenue on through or joint express traffic, the method of dividing the revenue between the carriers shall be that agreed upon between the carriers and such express company and approved by the Commission.

If for the guaranty period as a whole the American Railway Express Company does not have a deficit in operating income, it shall forthwith pay the amount of its operating income for such period into the Treasury of the United States. The amount so paid shall be added to the funds made available under section 202 for the purposes indicated in such section.

The Commission shall, as soon as practiable after the expiration of the guaranty period, certify to the Secretary of the Treasury the amount necessary to make good the foregoing guaranty to the American Railway Express Company. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of such company upon the Treasury of the United States for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

Upon application of the American Railway Express Company to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which,

such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by such company of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this subdivision such company will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated out of any money in the Treasury not otherwise appropriated a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

* * * * *

Sec. 212. (Added February 26, 1921.) (U. S. Code, Title 49, Sec. 79.) (a) In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) if for payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for payment in respect to the guaranty to the American Railway Express Company, out of the appro-

priation made by the fifth paragraph of subdivision (i) of section 209.

(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement.

LEGISLATIVE ACTS AND HISTORY LEADING UP TO AND SURROUNDING PASSAGE OF TRANSPORTATION ACT, 1920.

At a Session of the House convened Nov. 8, 1919, (Vol. 58, Congressional Record, Part 8, page 8141) under clause 3 of Rule XXII, Mr. Esch introduced a bill to provide for termination of Federal Control of Railroads, etc. (HR 10453) (Vol. 58, part 8, page 8178).

HR 10453 was reported without amendment accompanied by a report (No. 456). The bill and report were referred to the Committee of the Whole House. (Id. 8265).

At a session convened Nov. 11, 1919, (Id. 8308) the House resolved itself into the Committee of the Whole House and took up HR 10453. (Id. 8309).

In House Record, Nov. 11, 1919, (Vol. 58, Part 8, p. 8314), Mr. Esch said in part:

> "There is also contained in title 2 a provision as to guaranty. The guaranty provided in this bill is practically the standard return of the test period provided for in the Federal control act, but we try to differen-

tiate the guaranty of six months provided for in the bill in order that it may be fair to the Government. Under the standard return or rental or compensation provided for in the Federal Control Act—I do not care what term you use, as they are used interchangeably—the Government pays the railroads under Federal control annually the average railway operating income for the three years which ended on the 30th of June, 1917."

In House Record, Nov. 11, 1919, (Vol. 58, Part 8, pp. 8330-1-2), Mr. Barkley said in part:

"There are three ways by which we undertake in this bill for the Government to carry out its moral obligation, because our legal obligation ends when we turn the roads back in as good physical condition as they were when they were taken over; but in order that the Government may not be charged with having neglected even its moral obligations to these roads we provide three ways by which this period may be cared for while regular processes of the law are being put into operation to readjust rates and expenditures according to the needs of the roads. In the first place, we provide that the standard return which we have been paying the roads during the last two years shall be continued to them for a period of six months after the Government control ceases, and that a test period of three years ending June 30, 1917, and the corresponding six months of each one of those years is to be taken as an average, and that average is to be applied to the first six months after the roads are turned back to their owners. Of course, that is purely an arbitrary figure that the committee has adopted, and it can not be otherwise than an arbitrary figure. Some standard must be set up. If the Government is to guarantee these roads any particular returns during the transition period, as we call it, there must necessarily be an arbitrary figure, and we have taken the figure

which was in the Federal Control Act covering the compensation of the roads by the Government during the period of Federal control. I think that is a fair figure, although it is arbitrary, if there is to be any guarantee of the return.

* * * *

"My understanding is that when the Government took over the roads they took over a lot more than they intended to. They sent a blank order that was served on all the roads from a list furnished by the Interstate Commerce Commission. The result was that they took over about seventeen hundred little roads that they did not need, and they turned them back just prior to the 1st of July. Now, those were largely made up of short-line roads. They have insistently contended, and they have with a good deal of force contended, although they were taken over and were turned back almost immediately, that the operation of Federal control over the big roads was to their disadvantage in this respect, that they have been compelled to pay the same rate of wages to their employees as the wages fixed by the Federal Government on the roads under Federal control. And the reason they were compelled to do that was because they had to meet the scale of wages paid on the other roads or lose their employees. And there is a great deal of force in that contention. They also claim that traffic has been diverted from these smaller roads by reason of the Government desiring to send freight over the most direct routes, and in many cases freight has been diverted from the small to the trunk-line roads, and their earnings have thereby been cut down. We provide in this bill that the guarantee shall apply to the roads thus situated, just as it has to the roads that were operated by the Government during the period of Federal control."

In House Record, Nov. 11, 1919, (Vol. 58, Part 8, pp. 8342-3), Mr. Merritt said in part:

"The conditions are that these roads, not by their own desire but by the exigency of war and by the operation of law, were taken over by the United States and have been run by the United States for about two years. I do not say this by way of criticism, but the fact is that the operation of the railroads by the United States has produced a great deficit. There is a continuing deficit today. The personnel of the roads has been disturbed. The property of the roads, in the shape of cars, is all over the United States, and it will take a large amount of time and a great amount of expense for each road to get its property together, to get its personnel together, and to go on running as a separate entity.

"That is the reason why the committee has allowed this period of six months under the present guaranty, so that the roads may get new rates before the commission, and get their business started under these new rates, so when the guaranty ends they may be on their own feet and may go on in a self-supporting way.

* * * *

"The short line roads need our care and the bill aids them much, but the great roads on which the great transportation system of this country depends need our attention most; and I hope when this bill is passed it will be passed just as it is, and you gentlemen will feel and know that you have done to this country a great service, and have passed a great constructive piece of legislation, not primarily for the benefit of the roads but for all the people of the United States."

In House Record, Nov. 11, 1919, (Vol. 58, Part 8, p.8355), Mr. Dewalt said in part:

"Mr. Chairman and gentlemen, it undoubtedly sounds like a truism to say that the bill now under considera-

tion is perhaps one of the most important that this Congress will have in contemplation of passage. The importance of the bill arises from various circumstances. When the Government took under its control the transportation systems of this country, it was a matter of urgent necessity, and even then it was a a matter of doubtful expediency, so far as profit was concerned, and the result has shown that instead of being profitable, it was a dead loss to the Government.

* * * *

"But there are certain outstanding features in the bill which in my mind are the pivotal things in it—those which should command, and I think will command, the most earnest attention of the House sitting in the Committee of the Whole.

"Now, what are those outstanding features? First, we establish in this bill what is called a guaranty fund. What do we mean by a guaranty fund, and why should there be a guaranty? Anyone who knows anything about the situation, although he may perhaps be blind to the present emergency and necessity, if he has read and studied and observed with an impartial mind, must come to the conclusion that the transportation systems of the country, if they be returned on the 1st day of January next, are bound of necessity to require help. That arises from the fact that their organization has been disturbed; their transportation system has been diverted; short lines have been mingled with trunk lines; traffic has been diverted from one system of short lines to another, occasioned by the necessities of the Government during the war period; the official forces of the various railroad companies have been changed from time to time; superintendents of this or that division have been relegated to a different portion of the country, or perhaps to a different portion of the system itself—and all this requires

reorganization. We know, too, that great betterments and improvements have been made from time to time at the behest and dictates of the Government, occasioned by the war necessity, and thus has entailed a large amount of expense upon the railroad companies themselves. And therefore it becomes absolutely necessary, unless there be an immediate change of the rate system —enlarging the rates, increasing them—that these railroads shall have something to depend upon during a period perhaps, as we stated, for at least six months after the termination of Federal control. "Therefore we have established in this bill what we call a guaranty fund. Now, what is the guaranty fund? It provides that for a period of six months after the termination of Federal control there shall be paid to the various railroad companies, if they desire to avail themselves of it, the standard return as established during the test period, which time, however, expires on June 30, 1917, being the years during which the test period, as we call it, is to be formed. Now, the test period consists of three periods of six months, which are the corresponding six months severally mentioned, in the time during which the guaranty is to be sought or obtained by the various railroad companies."

In House Record, Nov. 12, 1919, (Vol. 58, Part 8, p. 8395), Mr. Sims said in part:

"Mr. Chairman, I rise in opposition to the amendment. Gentlemen, there is no use now in using language that misleads or deceives anybody or is likely to do it. Now, let us look the question fairly and squarely in the face. When we use the word 'deficits' in ordinary use, it means a deficit in expenses of operation; that is, that the railroad has not paid its way. Now, the meaning of deficit referred to here is that the Government lacked that much of having made operating expenses and the rental due

the roads. Now, last year my recollection is that the net earnings of the roads that could have been used in payment of dividends were as large or larger under war control than they were prior thereto.

"But Congress authorized the making of an extravagant contract of the rental, and did it purposely. We gave them a rental equal to the average net earnings for the three best years the roads ever had since railroading began in the United States. Now, do you suppose, if we had not taken them over, they could have made such a return under war conditions? I do not think so. The rental was severely criticized on this side and on the Republican side of the House. It was severely criticized in the Senate as being extravagant. But, as I said, we had to take the railroads over. The very necessity of operating them in a way to win the war made it necessary to take them over. It will be some time after the war is over before ordinary conditions will return which have been disturbed by reason of war operations. And the deficit was not a deficit at all in the ordinary sense. We lost on our rental contracts. That is all there is of it. Talking about the deficit in the first year means that we did not make the rent contract in addition to expenses of operation."

In House Record, Nov. 13, 1919, (Vol. 58, Part 8, pp. 8454-5), Mr. Connolly said in part:

"Gentlemen may say that the Government guaranteed the income during Government control. That is true only in a sense. The President took over the roads under the act of 1916. After they had been taken over it was necessary that some rate of rental be fixed for their use. The President had deprived the owners of possession and assumed it himself. The average earnings for the years 1915, 1916, and 1917 was fixed because it was contended that these years being the three

consecutive preceding years afforded the best guide as to what the roads would probably earn from January 1, 1918. However, it is quite another thing to continue the guaranty after the roads have been released. It is one thing to take property under a war power and to, at least theoretically, exclude the owners from control, and for the use of such property to pay liberal rent, and quite another thing to guarantee the same rent after the owners have been restored to possession."

In House Record, Nov. 13, 1919, (Vol. 58, Part 8, p. 8476), Mr. Welty said in part:

"The bill provides a guaranty of the income they received for the three years ending June 30, 1917, averaging for the eastern district, consisting of 37 railroads, 11.48 per cent; for the southern district, consisting of 20 railroads, 12.37 per cent; while for the western district, consisting of 29 railroads, 9.96 per cent."

In House Record, Nov. 13, 1919, (Vol. 58, Part 9, p. 9159), Mr. Keller said in part:

"Section 207 provides for the guaranty to the carriers after the termination of Federal control. Under this section the United States guarantees the operating income of the railways for a period of six months after the termination of Federal control, such income to be equivalent to the average operating income of each railroad during the three-year period ending June 30, 1917, or, in other words, equal to their operating income during the three most prosperous years in railroad history."

In House Record, Nov. 17, 1919, (Vol. 58, Part 9, p. 9189), Mr. Box said in part:

"It guarantees the 'standard income' of the railways for a period of six months after they are returned to the owners. The 'standard income' is the average return received by the railroads during the three years just preceding our entry into the war—the best three-year

period for them in their history."

In House Record, Nov. 17, 1919, (Vol. 58, Part 9, p. 9209), Mr. Griffin said in part:

"These guarantees are the most objectionable features of the bill:

"First, there is the guarantee of income to railroads for six months following the termination of Federal control, based on their income for a test period of three years ending June 30, 1917, a period which was the best in their history. *Upon what theory such a guaranty is expected or granted is difficult to discern.*"

In House Record, Nov. 17, 1919, (Vol. 58, Part 9, p. 9211), Mr. Welling said in part:

"I want to deal fairly with the railroads. I am quite willing that the Government shall say to them, 'We are now starting you out in business for yourself. We will guarantee to give you your standard return for the first six months after you begin business.' That will cost this country at least $150,000,000. The bill gives that as a matter of justice to provide for the period of reorganization and readjustment, * * *"

HR 10453, known as the Esch-Cummins bill, passed the House on November 17, 1919. (See Vol. 58, Parts 1 to 9, pp. 8691-8692, Congressional Record, 66th Congress).

In the Congressional Record, 66th Congress, Vol. 59, Part 1, p. 884, is reported:

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill (HR 10453) to provide for the termination of Federal control of railroads and systems of transportation; to provide for the settlement of disputes between carriers and their employees; to further amend an act entitled "An Act to regulate commerce," approved February 4, 1887, as amended, and for other purposes, which had been reported from the Committee on Interstate and Foreign

Commerce with an amendment, to strike out all after the enacting clause and insert a substitute.

Mr. Cummins: "Now Mr. President, I ask unanimous consent that in lieu of the matter proposed to be inserted in the House bill, H. R. 10453, there shall be inserted the text of the Senate bill, S. 3288, as amended up to the present time, and that reservations concerning amendments can be made in the Senate upon House bill 10453 in the same way and to the same extent as though Senate bill 3288 had continued on its way to final passage."

December 19, 1919
Senator Gay, of
Louisiana.

Senator Gay (Id., 905-908): "Mr. President, it is with some hesitation that I venture upon a subject which I know to be most difficult and at which I do not claim to be an expert. The railroad problem is the most complicated and the most difficult of all domestic problems now presented for solution. Sometimes I feel that we are bewildered more than we are helped by the advice and the statistics of experts, and I have endeavored to study, in as simple and effective way as I could, some of the salient features of the railroad situation, and particularly certain aspects of it that are of special interest to the people of my State. I have ascertained some facts that have been helpful and interesting to me, and I submit them in the hope that they may be beneficial to some of my colleagues.

* * * *

"On December 26, 1917, the President of the United States, acting under authority granted by Congress, issued a proclamation whereby he assumed possession and control of the railroads of this country as of December 28, 1917. A Director General of Railroads was ap-

pointed, who began to operate the railroads as instruments of war.

"What was the financial arrangement made between the railroads and the Government? The Federal-control act of March 21, 1918, provided that the owners of the railroad properties should receive, as just compensation for the use of the properties, an annual sum equal to the annual net railway operating income for the three years prior to Federal control—1915, 1916, and 1917. Otherwise stated, the Government agreed to pay the railroads as rental for the use of their properties an annual sum equal to their annual net earnings, if we may employ that expression, prior to Federal control. For the railroads under Federal control that sum is approximately $75,000,000 per month, which figure represents not only the monthly rental which the Government is now paying to the railroads for the use of their properties, but also the average net earnings prior to Federal control. Railroad earnings now go to the Government. If the net railway operating income at the present time were in the neighborhood of $75,000,000 monthly, it would mean about an even break for the Government; in other words, the earnings would equal the rental that is paid. If the net railway operating income should drop to say $50,000,000 per month, it would mean a loss to the Government of $25,000,000 per month. It would also mean that if the railroads were returned to their owners, they would find their earning power, other things being equal, less by $25,000,000 than it was when the Government assumed possession and control of their properties. * * *"

Mr. Gay. "The Senator (Senator LaFollette) is correct. As I say, I do not contend that the rental paid is just what it should be, but I can not say that the railroad earnings for the first three years of the war were

abnormally large.

"The interests involved are so numerous and so complex and the difficulties are so great that it is well-nigh impossible to prescribe by legislation fiat what would be reasonable and proper earnings for the railroads. If the problem can not be left to the good judgment of an expert and impartial tribunal, then I confess I see no other solution. The House bill proposes to leave this to the discretion of the commission, as heretofore. I submit that this is a sane and satisfactory solution of a most difficult problem.

The Short Line Railroad Problem.

"In a very real sense it may be said that the so-called 'weak' railroads constitute the crux of the railroad problem as it exists today. If all the railroads in the United States were able to make a reasonable profit from their operation under existing wages and existing prices, there would be no railroad problem to solve. But the truth is that even before the war a huge percentage of the country's railways operated without a profit. I have already shown that in 1916 which was a favorable year, over one-third of the total outstanding stock paid no dividends whatever. There is one proposition that I have not heard contradicted, and which seems to me to be indisputable, and that is this: A poor, weak, dilapidated railroad, without adequate revenues, without suitable equipment, and without credit is unable properly to function as a public servant. The public is entitled to demand of its transportation agencies reasonable and adequate service; but if the public denies to the railroads a decent livelihood it must be content with inadequate service.

"Weak railroads are of two classes or types: First, the larger railroads, with good earning capacity, which have been financially wrecked by wanton corruption

and criminal management. For these I hold no brief. One has only to read the reports of the Interstate Commerce Commission to see to what extent the public trust has been betrayed by certain men for their private gain. No one who has studied the New Haven fiasco and the Rock Island crime can fail to see the need of adequate control over security issues and of strict regulation of the practices of common carriers. But I do not desire to speak at length of these railroads. Their story is told eloquently enough by their own misdeeds. I desire to speak of the other type of weak railroad, the one which is honestly constructed, economically and efficiently managed, but which is unable, because of conditions over which it has no control, to maintain its credit on the level which is demanded in the public interest.

"One of the principal industries in the South, Mr. President, is the lumber industry. It is difficult to exaggerate the importance of that industry, either to the people of the South or to the railroads of the South. Its importance may be gauged by the fact that in a recent case before the Interstate Commerce Commission it was shown as I am told, that an increase of but 1 per cent per 100 pounds on lumber from the producing regions of the South to the Ohio River crossings would increase enormously the earnings of nearly all railroads in southern classification territory. With the single exception of products of mines, lumber and its products constitute the most important tonnage, from a revenue standpoint, of the railroads of this country.

"It is a well-known fact that only a few years after the development of the southern lumber industry the forests near the principal railroad routes were exhausted. It became necessary to project short-line railroads, sometimes called 'tap lines,' into the very heart of the

pine forests. Courageous men undertook this task, knowing all the while that the railroads so constructed would have to rely almost wholly on the lumber tonnage. As the timber was cleared away the roads found it necessary to build deeper and deeper into forests, increasing the cost of operation. In some instances the cleared areas were converted into farm lands, the products thereof contributing to the inadequate tonnage of the carrier.

"Throughout the South, Mr. President, there are numerous railroads of this character. They represent an aggregate investment of millions upon millions of dollars, they employ thousands of men, and countless towns and villages depend upon them exclusively for transportation service. In the vast majority of cases these railroads are financially weak. They are literally struggling for existence as the forests upon which they depend for freight tonnage gradually disappear.

"Almost without exception these small lines of railroad connect with strong trunk lines, such as the Illinois Central, the Louisville & Nashville, and the Southern. Joint through rates on lumber are published from the points of origin on the short lines to Chicago and other markets. The joint through rate is divided between the trunk line and the tap line on a basis agreed upon between them. As a matter of fact, however, the tap line is compelled to take whatever allowance the trunk line gives it, and this allowance in altogether too many instances is wholly insufficient and inadequate. To illustrate, the through rate on lumber from Louisiana and Mississippi mill points to Chicago is approximately 30 cents per 100 pounds. The tap line hauls the lumber from the forest to the junction point with the trunk line and for this service receives in many instances the meager allowance of 2 cents per 100 pounds. The trunk

line receives 28 cents.

"Now, Mr. President, this is not an exaggeration, but on the contrary, it is a fairly typical case. These short-line railroads are the 'feeders' of the trunk lines. Without them the trunk lines would have practically no lumber tonnage. Like the many small streams whose waters join to form a mighty river, the tap lines of the South gather together a mighty volume of freight traffic that constitutes the very life blood of the larger railroad systems. Yet in many cases they receive for their important service as their division of the through rates a mere pittance, which keeps them constantly on the verge of bankruptcy and renders them incapable of performing satisfactorily the service which the public is entitled to demand.

Mr. LaFollette. Mr. President—

Mr. Gay. I yield to the Senator from Wisconsin.

Mr. LaFollette. I should like to inquire of the Senator whether the case of the short-line roads has been presented to the Interstate Commerce Commission, if he knows?

Mr. Gay. Does the Senator mean recently?

Mr. LaFollette. Yes, within a reasonable period.

Mr. Gay. I do not know that it has.

Mr. LaFollette. I mean in order to determine what share of the joint rate they are entitled to.

Mr. Gay. I shall be glad if the Senator would furnish any information he may possess on that subject.

Mr. LaFollette. I am just at the moment inquiring whether the Senator has any information upon the subject.

Mr. Gay. No; I have none available at the moment.

The War burden has fallen very heavily on these short-line railroads; much more heavily than on the larger systems. The Director General of Railroads as-

sumed possession and control of certain railroads and refused to assume possession and control of others. I think it highly important that we clearly understand the basis upon which some railroads were taken over by the Director General while others were not. I believe, Mr. President—and I should be very happy indeed if it could be shown that my belief is unwarranted—that the Director General in many cases refused to take over certain railroads for the sole reason that it would not be advantageous from the point of view of the Railroad Administration's financial showing to take them over. Certain it is that the Director Generol hastened to assume possession and control of practically every railroad in the country whose financial showing was good, and it is equally certain that he failed to take possession of scores upon scores of weak railroads, particularly in the South, whose financial condition for years has been extremely unfavorable.

It cannot be said, Mr. President, that these weak railroads were released from Federal control because they were not performing a war service. Where, may I ask, did the lumber originate with which our cantonments were constructed? Where did the lumber originate with which our shipyards were constructed almost overnight? Where did the lumber originate with which to build, as if by magic, a fleet of boats to cover the seven seas? This lumber, Mr. President, or a very large portion of it, came from the tap lines of the South. They labored feverishly to meet the demands of the war; they responded promptly and patriotically to the country's call; they worked almost exclusively on war business. And the Director General refused to take them over because he thought that it would be more economical, from his point of view, to make them bear the burden themselves.

Whether or not this was honest dealing and in harmony with our traditional American policy of fair play for all, I leave to the judgment of the Senate. Certain it is that the stronger railroads were taken over by the Government and paid a rental that is generally regarded as adequate, if not generous, for the use of their properties. These larger railroads were not affected by the war. Their war burden was borne by the Government, and they received as rental for their properties the same profits that they had earned in three prosperous years before the war.

I will say to the Senator from Wisconsin (Mr. La-Follette) that that answers the questions which he asked only a few moments ago.

The short line railroads were cast adrift. They had to bear alone and unaided the war prices of labor and materials. Their properties were devoted to the Nation's service just as truly as were the properties of other railroads; yet they received not one cent of rental from the Government, and all they have to show for their patriotic response to the Nation's call is red ink figures on their books.

To show the short line railroads of this country have been disadvantageously affected by the failure of the Government to assume possession and control of the properties, and to pay a fair rental for their use during the period of the war, a study has been made of the operations of nine typical short line railroad companies operating in the states of Mississippi and Louisiana. The result, which I believe to be fairly typical of the general situation, may be summarized as follows:

The Arkansas and Louisiana Midland Railway Co. earned during the three fiscal years 1915, 1916, and 1917 an average net railway operating income of $32,016. Had this railroad been taken over by the Government

and paid rental for the use of its property in the same way that other railroads under Federal control are paid, it would have received from the Government the annual rental of $32,016. As a matter of fact, it earned during the year 1918 but $3,964.69. In other words, this railroad received a profit from operation of approximately $28,000 less than it would have received had it been accorded fair and equal treatment on the basis defined by Congress for all railroads under Federal control.

The Gulf & Sabine River Railroad is another typical short line railroad of the South. Had that railroad been under Federal control it would have been paid as rental for the use of its property during the year 1918 the sum of $24,775. As a matter of fact that railroad was not taken over by the Government, and during the last calendar year it earned a deficit from operation of $12,020.24. In other words, this railroad company earned approximately $36,700 less during the last year than it would have received on the basis recognized as just and fair for all railroads under Federal control.

The Kentwood and Eastern Railway Co. is another good example. Had it been taken over by the Government its standard return would have been $42,888 per year. It actually earned last year $11,226.76.

For other similar railroads the result may be briefly summarized as follows:

Natchez, Columbia & Mobile Railroad Co., standard return $27.56; results for the year 1918 show a deficit from operations of $4,502.48.

Mississippi Eastern Railway Co., standard return $13,654.16; actual results of operation for year ended December 31, 1918, $2,284.50.

Alexandria & Western Railway, standard return $5,728.29; earnings for last year $3,249.32.

The Mansfield Railway & Transportation Co. would

have received from the Government $12,244.26. Its actual earnings for 1918 were $2,092.47.

Batesville & Southwestern Railroad Co. standard return $6,725.87; earnings for last year $13,199.54.

Tremont & Gulf Railroad Co. would have received from the Government $84,449.14. Its earnings were $48,948.52.

Had all these nine railroads been taken over by the United States Government as instruments of war, and had they been accorded the same treatment that was given to the railroads under Federal control, their aggregate rental or standard return for the year 1918 would have been $222,508.28. Their actual return aggregated $68,443.08. In other words, it may be fairly said that unjust, unfair, and discriminatory treatment of these nine railroads cost them in the aggregate the sum of $154,065.20.

Mr. Chamberlain. May I interrupt the Senator at that point?

Mr. Gay. Certainly.

Mr. Chamberlain. Were these facts brought to the attention of the Director General of Railroads by the people operating the roads and was any effort made by them to have these injustices corrected?

Mr. Gay. I am sure they have been brought to the attention of the Director Generol of Railroads from time to time. The figures which I have presented have been published. The figures can be verified from the reports of these carriers to the Interstate Commerce Commission. They are thoroughly reliable, in my opinion, and I believe they are facts, as I said, that are well known.

Mr. Walsh of Massachusetts. Does this same condition exist throughout the country to which the Senator has been referring as existing in Louisiana?

Mr. Gay. I have not only cited railroads in Louisiana,

but I have cited railroads in Mississippi and other Southern states.

Mr. Walsh of Massachusetts. It probably exists throughout other states.

Mr. LaFollette. It is pretty general with reference to the short line roads.

Mr. Gay. I have no doubt that that is true. I shall not dwell on what seems to me to be the unfair, ungenerous and thoroughly un-American treatment of these railroads during the war. Our present problem is to see to it that the injustice is not continued; and this leads me to a consideration of what seems to me to be a vitally important matter, namely, the jurisdiction of the Interstate Commerce Commission over the division of rates between common carriers.

(Id. 905-908.)

Mr. Cummins. I move that the Senate request a conference with the House of Representatives on the bill and amendment, and that the Chair appoint the conferees on the part of the Senate.

The motion was agreed to; and the Vice-President appointed Mr. Cummins, Mr. Poindexter, Mr. Kellogg, Mr. Pomerene and Mr. Robinson conferees on the part of the Senate.

(Vol. 59, Part 1, page 952.)

The House disagreed to the Senate amendments and agreed to the conference requested by the Senate. The Speaker named as conferees on the part of the House, Mr. Esch, Mr. Hamilton, Mr. Winslow, Mr. Sims and Mr. Barkley. (Vol. 59, Part 1, p. 1004.)

Senate Conference committee present report (Senator Cummins) upon House bill 10453, which was ordered printed in the Record. (Vol. 59, Part 3, pp. 3043-3059.)

The House took up Conference committee report on H. R. 10453. After full conference, the conferees

recommended that the House recede from its disagreement to the Senate amendments and agree to same with an amendment. Here follows bill as amended and agreed to by conferees. (Vol. 59, Part 4, pp. 3243-3266.)

Mr. Esch stated in part (Id. p. 3268):

"Another thing I wish to call your attention to is in regard to the short line railroads. I do not think any one subject in connection with the bill has caused more discussion and aroused a greater interest than the short line roads. We have sought to deal generously with those carriers. The conference agreement deals with them more generously than did the House bill. In the House bill we did not take care of all the short lines on the question of guaranty. We practically limited them to those that were in competition with the roads under Federal control, but did not take care of those 'connected with' a road under Federal control.

"The Senate bill had the latter provision, and the House has agreed to it. So that these short line roads are now taken care of in the provision as to deficits and the guaranty provision. This guaranty provision is for a period of six months. Under the Senate bill there was uncertainty as to the period of the guaranty. It allowed two months in which to file claims for increases and four months thereafter in which the commission could determine the amount of such increases, leaving, therefore, the period rather undefined. The Senate has yielded and adopted the House provision as to a straight six months' guaranty.

"But the question will be raised why we should guarantee at all. When Federal control ceases why not have the guaranty of the Government for a standard return also cease? The reason lies in the financial straits of the carriers when Federal control shall cease.

"What is the situation? Prior to the war 60.38 per cent of the roads of class 1 earned a dividend and paid their interest. The balance did not. During the period of Federal control only 57 of the 175 class 1 roads earned their interest and only a few paid dividends.

"One hundred and eight of them did not earn their interest, and, of course, could not pay dividends, and many did not earn their operating expenses.

"With this situation confronting the carriers on the 1st day of March, the committee of conference indorsed the attitude of both Senate and House, continuing the guaranty in the House bill for a straight term of six months.

"In 1919, 108 class 1 roads lacked $60,000,000 of earning their interest and fixed charges. The net operating income last year was only practically half of the standard return which we guaranteed. Should we thrust these roads on their own resources on the 1st of March without a guaranty, I make the prediction that within three months 50 per cent of them would go into receiverships. Do we want to do that? Ought we to do it? No; because receiverships for railroads means receiverships for industrial plants and all classes of business throughout the country.

"I believe that in other respects we have well taken care of the short lines with respect to the matter of the rule of rate making. The short line as a rule got only a pro rata of the distance hauled, did not get a pro rata of really what its service was worth. In this bill we prescribe that the Interstate Commerce Commission shall have the right, even on its own initiative, to create just and equitable divisions of rates between the short lines and its trunk-line connections, and we prescribe what the Commission shall consider in arriving at what is a proper division of the rates. We also take care of them in the matter of the diversion of traffic.

They have often suffered because the trunk line would divert traffic from the short line. We take care of them also with regard to traffic which is not routed by the shipper, but which the trunk line could at junction or terminal points divert to a favorite carrier. We take care of that situation. We also permit the joint use of terminals, and we adopt the Senate suggestion to the effect that there shall be included within terminal facilities main-line track or tracks within a reasonable distance outside of the terminal. It will avail a short line nothing if it can get to the city limits and then can not go over the tracks of the trunk line and into its terminal. We protect that situation under the supervision of the commission.

"We take care of them in the matter of consolidations, and also allow them 100 per cent compensation under the Federal Control Act. We also take care of them in the matter of loans to carriers.

I think on the whole the short line roads have been fairly and possibly generously treated, but unless they are fairly and generously treated the trunk line itself may suffer, because the short line is the feeder for the trunk line, and it is as necessary to the people living thereon as is the trunk line to the people it serves.

"In the guaranty section, the Senate bill provided that the excess of the guaranty over the standard return based on the test period should be paid into the Treasury of the United States. The House bill had no such provision. The House in this particular receded and the excess is to be paid into the Federal Treasury, but the House bill safeguarded this matter by giving the Interstate Commerce Commission supervisory control over the expenditures of the carrier during the six months, because you can readily understand that unless there is some supervisory control over these expendi-

tures for maintenance of way, equipment, and so on, the carrier might spend so much money thereon that there would not be any surplus. The carrier might make abnormal, unreasonable expenditures. We give the commission a supervisory control over expenditures during the six months period, and the commission can say to the carrier. 'We shall demand a restatement of accounts at such time as we see fit and proper, in order that there may be no padding of the expense account of your roads during the six-month guaranty period.' We go further and say to the roads that if during the six-month guaranty period they need advances to help pay operating expenses, we will make advances on proper security, and should the advances exceed the guaranty, the excess will have to be repaid."

Mr. Barkley stated in part (Id. p. 3272):

"But we did take them over. We did operate them during the war. We did agree to pay them a sum equal to their average income for the three years previous, and we did agree that when returned they would be in practically as good physical condition as when taken over. In order that these agreements might be kept we have taxed the American people something over $850,000,000 in order to pay out of the National Treasury the losses sustained by the government in the operation of the railroads. This amount must be wiped off the books as a war loss, due entirely to the fact that the expenses of the roads on account of increases in wages and costs of materials were larger than the increase in revenues resulting from increased rates.

"The government, however, has done much more than merely make good this loss.

* * * *

"In addition it guarantees to them for the next six months the same proportionate income which they have

received from the government during the period of Federal control, and if the same ratio of revenue and expenses should prevail during that six months which has prevailed on the average during the Federal control, the loss to the government by reason of this guaranty will amount to nearly $200,000,000. In addition to all this, the pending bill proposes to make good the losses off all the railroads sustained during the period of the war and Federal control, whether the roads were ever taken over or not and regardless of whether they rendered any service to the government in connection with the war.

H. R. 10453 passed by the House February 21, 1920. (Id. p. 3316).

February 28, 1920, Senate took up conference report on H. R. 10453 (Vol. 59, Part 4, p. 3326).

Senator Robinson spoke in part as follows: (Vol. 59, Part 4, p. 3329):

"It seems neither necessary nor appropriate, in view of the publicity which has been given to the measure and explanations of its provisions which already have been made by others, that I should undertake a complete review of the conference report.

"Important subjects dealt with among others include:

(1) Legislative approval and express authorization of the return of the railroads to private control and operation March 1, as proclaimed by the President, and the settlement by him of matters arising out of Federal control;

(2) Provisions relating to compensation of carriers, including carriers having no contract;

(3) Procedure respecting causes of action arising out of Federal control;

(4) The refunding of carriers' indebtedness to the United States;

(5) A six months' guaranty to carriers after termination of Federal control;

(6) New loans to railroads;

(7) Provisions relating to water transportation;

(8) Generous treatment of short line railroads;

(9) Modification of the long-and-short-haul clauses of the act to regulate commerce;

(10) Federal control of issuance of stocks and bonds by carriers;

(11) Provisions relating to rates and returns of railroads; and finally

(12) Labor provisions.

* * * * *

"The primary purpose of the pending legislation, broadly stated, is to terminate Federal control and restore the railroads to their owners for operation under conditions which will prevent a breakdown of the transportation systems and assure the public necessary and adequate facilities.

"To comprehend the important phases of the problem is pre-requisite to a fair determination as to the sufficiency of the remedies agreed upon.

"Federal control of railroads was caused by the threatened breakdown in the operation, particularly in the eastern part of the United States, at the time we entered the war.

* * * * *

"The policy of the conference bill accords generous treatment to short line railroads. While there are a few short lines which probably should never have been constructed, considered as a whole the short lines are regarded by the conference and are treated in this bill as indispensable to the industrial and commercial interests of the entire country, as well as to the development of the various localities which they immediately serve."

Febraary 23, 1920—Senate agrees to conference report (Id. p. 3349).

The bill was examined and signed by the Speaker of the House and the president pro tempore of the Senate. (Id. p. 3435) and presented to the President (Id. 3484) and approved (Id. p. 3709).

EXTENSION OF REMARKS

Mr. Madden said in part:

"Many members here are opposed to the bill because of what they call improper guaranties. Now, what is it that is guaranteed? Nothing, except that the roads shall be turned over to the owners with a certainty that they will be permitted to earn the amount paid them during the war under the standard return contract for a period of six months from the 1st of March, and this guaranty applies also to the wages of the men, which it is provided shall not be reduced by any action of the railroad owners during the six months' period ending September 1 next." (Feb. 21, 1920, Vol. 59, Part 9, p. 8833).

"On the whole I think the bill will meet the approval of the people of the country. It is a simple measure of justice to the owners." (Feb. 21, 1920, Vol. 59, Part 9, p. 8833).

Mr. Lankford said in part:

"What is the sugar of the present bill? Well, to me the good part of the present bill is its most excellent provisions for the short lines of railroads. The short lines of railroads mean so much to my section of the State that I felt like I could not afford to vote against anything in their behalf. I found myself studying hour after hour over the bill and trying to whip myself into line to vote for the bill on account of the short lines of railroads and because many of my friends asked me to do all I could for the short lines. I begged the conferees

to put in the provisions in favor of the short lines which are in the bill, and now they are in the bill; and at last I was forced to vote against the bill because of the poisonous, vicious provisions of the report." (Feb. 23, 1920, Vol. 59, Part 9, p. 8852).

Mr. Connally said in part:

"Mr. Speaker, the measure now before the House, the conference report on the railroad bill, is of such importance and affects so directly every consumer in the United States that I desire to state some of the reasons prompting me to vote against the measure:

"First, it requires the Government to pay to the railroads the amounts due for rental during Federal control, but allows the railways to fund their indebtedness to the Government, amounting to approximately $1,300,000,000, and at their option to owe the Government this sum for 10 years.

"Second, it guarantees the railroads' income for six months after termination of Federal control. If the roads do not earn the fixed income with high rates the Treasury is to make good the deficit." (Feb. 21, 1920, Vol. 59, Part 9, p. 8859).

Mr. Strong said in part:

"The railroads were taken over by the Government as a war necessity, the agreement being made that a 'standard return' or rental, would be paid to the owners, and that they would be returned when the war was over. The government loss during the operation of the roads has been over $636,000,000; many millions have been expended in improvements which the roads are to repay when they are able. The present expenditures over receipts is between $1,000,000 and $2,000,000 per day." (Feb. 21, 1920, Vol. 59, Part 9, p. 8878).

"It has been the duty of the committee to draft a bill which would include what they felt to be the best of all

the plans proposed, avoiding what they believed to be objectionable. On November 8 the Esch bill, named after the chairman of the committee, was finished and reported to the House. It contained guaranties necessary to continue the standard return until such time as it was thought the owners could either reduce their expenses or increase their incomes." (Feb. 21, 1920—Vol. 59, Part 9, pp. 8878-9).

"It continues the same standard return provided in the Esch bill for a period of six months, during which time the wages now paid the men are not to be reduced." (Feb. 21, 1920, Vol. 59, Part 9, p. 8879).

Mr. Browne said in part:

"I am against the guaranty provisions of this bill. * * * In general, it provides that every railroad company shall be guaranteed by the Government in its earnings an amount equal to the average amount that it received the three years preceding our entrance into the war, this guarantee to last six months after the railroads are turned back to their owners." (House Record, Nov. 17, 1919, Vol. 58, Part 9, p. 9219).

Senate Bill 3288, being the Railroad Bill, presented by the Senate Committee on Interstate Commerce, was introduced in the Senate by Senator Cummins and placed on the Senate Calendar October 23, 1919. (Vol. 58, Part 7, pp. 7374-5).

The Senate Committee also presented a report (No. 304) through Senator Cummins to accompany S. 3288, known as the Railroad Control Bill, which was received and ordered printed. (Id. Vol. 58, Part 8, p. 8187).

NOTE: The debate on S. 3288 continued over an extended period to and beyond the time the Senate requested of Senator Cummins and took up and considered HR 10453 along with S. 3288. From these two bills came the bill that went to conference, which, with changes, as was agreed upon by the con-

ferees, was reported back to the Congress and enacted into law as Transportation Act of 1920.

That which follows is quoted from the Congressional Record of the 66th Congress during the Senate debate of the bill. Senator Cummins, Dec. 4, 1919, spoke in part as follows:

"The Federal control bill, which became a law on the 21st of March, 1918 provided, as you all know, for the possession on the part of the Government of all the railway systems of the United States of which the President chose to take possession, under a paragraph of the act of 1916, of which I think the distinguished Senator from Colorado (Mr. Thomas) was the author. The dominating features of the act of 1918 were, first, a provision authorizing the President to enter into agreements with the railway systems of which we took possession relating to the compensation to be paid to these several companies while under Federal control. This compensation in the aggregate, and as related to class 1 railroads, amounted, in round numbers, to $900,000,000 annually; and here I may be permitted to say that on the 1st of January, 1918, the President, in fact, took possession of all the railways of the United States. I say 'all.' There may have been very slight and negligible exceptions, but it is practically true that when the notices were sent out by the President on the 1st of January, 1918, they comprised all the railway systems of the country. The act of March 21, 1918, provided, however, that at any time prior to the 1st of July, 1918, the President could dismiss from Federal control any system or systems of railway which in his judgment it was not necessary to retain in order to carry out the purposes of the act. I may remark again that there were some of us who believed that justice required that all the railways of the United States be retained in the possession of the Government, because we felt that it was utterly

impossible for the President to dis-associate the railways and do justice to those which were dismissed from operation, inasmuch as the relation between the railways held by the Government and the railways not held by the Government was so intimate and intricate that to abandon that relation would probably result in great hardship.

"It has resulted in great hardship. That law was passed and the President vetoed it. That is my recollection. But, at any rate, just before the 1st of July, 1918, the President formally discharged a very large number of the railways of the country from Federal control. I think that he discharged at that time, or had before that time discharged, something more than 800 of the railways. These were, generally speaking, short line railways, which depended for their maintenance largely upon their traffic relations with the trunk lines. The $900,000,000 of which I have spoken as the maximum of the compensation provided for in the act of March 21, 1918, is the compensation for what is known as class 1 roads; and the class 1 roads, as you all remember, are those railways whose gross revenues from operation amount to $1,000,000 or more per year." (Vol. 59, Part 1, p. 118).

"I ought to say that there is another phase of this matter which I believe Senators should bear in mind. I remarked that on the 1st of January, 1918, the President took possession of all the railroads in the United States. On the 1st of July, without physically interfering with many of them, he returned 700 or 800 of the railroads to their owners. The claims which I have mentioned do not include the claims of those companies. The short line railroads of the country are all claiming that the Government shall stand responsible for the losses which occured during the six months in which the

Government had nominal possession of their properties on account of the diversion of traffic, the destruction of their business, and the disintegration and disorganization of their entire operating and managing force. I do not know what those claims may aggregate. It makes me shudder a little when I look forward to what may be insisted upon against the Government in the next few years." (Vol. 59, Part 1, p. 122).

"I was never able to ascertain from my survey of the situation just what actuated the Railroad Administration in dealing as it did with some of the short line railroads. I think that in all the history of our relations to the railways that there never was injustice that was comparable with the injustice which the Government has inflicted upon some of the weak short lines of railroads, barely able to sustain themselves in normal times and utterly unable to maintain themselves during the last two years. We have done precisely what I stood here and said we would do—we have paid to the big railroads a compensation so excessive as to shock the moral sense of mankind and we have permitted the weaker railroads, which are just as necessary for the transportation of the United States as are the stronger ones, although not in the same degree, to struggle through these two years in a way that creates the only sympathy I have ever felt toward railway management. There are so many instances in which the superior force of the Railroad Administration, with its monopoly of all the influences of the land, has exerted against the shorter, weaker lines that I could not enumerate them if I were to stand here all the remainder of the afternoon. As I replied to the Senator from Kansas one of the prominent motives in the minds of all the members of the committee in the construction of this bill has been to do tardy and, I fear, incomplete justice to these roads that have

been so severely discriminated against in the last two years. But we will come to that with more detail later on." (Dec. 4, 1919, Vol. 59, Part 1, p. 122).

"The average rate of return upon the property investment accounts of all the railroads in the United States for the test period was 5.2 per cent, and if it were assumed that the value of the property is the amount of the property investment accounts, this increases that average by three-tenths of 1 per cent. My own judgment is, however, that it will be found that the value of the properties is less than the aggregate investment accounts and therefore the 5½ per cent will probably not be greater than during the test period.

"Those of you who heard me discuss the Federal Control bill heard me say that I thought the compensation which that bill provided for was something like $200,000,000 more than it ought to be. I am of the same opinion still. I have seen nothing to disturb my judgment in that regard, and inasmuch as it has been suggested to me that there is something inconsistent in my advocacy of a 5½ per cent basis and my statement that the compensation provided for in the Federal control bill was $200,000,000 more than it should be, I beg the privilege of pointing out the difference between the two cases.

"In the Federal control bill we were providing for an income for each individual railway, and I felt then and I feel now that the amounts which we agreed to pay to a great many of the railroads which passed under Federal control were excessive; but now we are dealing not with a particular railway, but with an entire system of railways in an entire rate-making district, and there is here no provision to pay or allow to these stronger railroad companies the excessive income which was permitted under the Federal control act." (Vol. 59, Part 1, pp. 135-136, Dec. Dec. 4, 1919).

Senator Kellogg, December 5th and 6th, 1919, in speaking on the bill in question stated in part:

"Let us therefore consider the financial condition of the railroads when the Government took them over and the present financial condition. In 1917 the gross earnings of all class 1 railroads totaled $4,050,463,579. The total operating expenses aggregated $2,858,212,210, and the net income equaled $974,778,937, while the best information we can get for 1919 will show that the railroads will earn substantially $5,232,000,000 with less business than in 1917. This estimate may be a little large on account of depression in November. This is on account of an increase in freight and passenger rates from 25 to 50 per cent. And yet the operating expenses of the roads have increased from $2,858,212,210 to an estimated operating expense, including taxes and rentals, of $4,695,500,000, leaving an estimated net income of only $536,500,000, or nearly $400,000,000 less than the guaranteed income which was the average of the net earnings of the roads for the years 1915, 1916 and 1917.

* * * *

"In 1917 all of class 1 railroads of the United States earned 5.38 per cent on their property investment. This was the last year of private operation. In 1918 they earned 3.71 per cent and during the first six months of 1919 they earned eighty-four one-hundredths per cent—of course I am taking book values because I have no others available—but the first six months of the calendar year is, on the average, the poorest half of the year. And the first nine months they had earned 2.19 per cent, which is estimated for the year to be 2.92 per cent, or less than the interest on the bonds and fixed charges of the railroads without paying anything at all on capital stock; and it is conceded by everyone that the bonded indebtedness of the railroads is six or seven bil-

lions less than the fair value of the properties.

"I ask to have printed in the Record as a part of my remarks as Appendix B a statement showing the names of the railroads, the miles operated, the net operating income, the fixed charges, and the balance over fixed charges for the first nine months of 1919, and also a summary of this statement by districts; and as part of the same statement Appendix C, showing the railroads which earned a greater or less sum than the standard return. (Id. pp. 217-218).

APPENDIX B.

Federal earnings compared with corporate fixed charges, 9 months to September 30, 1919. Recapitulation.

District	Miles Operated	Net Operating Income. (Federal Operation)	Fixed Charges for Period	Bal. Over Fixed Chgs.
Roads showing Balances:				
Eastern Dist. (23 roads)	18,052.05	$ 95,008,866	$ 62,318,180	$ 32,690,686
South Dist. (12 roads)	12,693.63	35,716,158	24,061,924	11,654.234
West. Dist. (22 roads)	52,822.10	140,900,353	74,113,211	66,787,142
Total (57 roads)	83,567.78	271,625,377	160,493,315	111,132,062
Roads showing Deficits:				
Eastern Dist. (42 roads)	40,147.72	42,291,404	129,199,206	*86,907,802
South Dist. (23 roads)	30,292.43	19,275,888	41,813,954	*22,538,066
West. Dist. (43 roads)	74,946.03	65,790,482	124,134,880	*58,344,398
Total (108 Rds.)	145,386.18	127,357,774	295,148,040	*167,790,266
Net Total: Eastern Dist. (65 roads)	58,199.77	137,300,270	191,517,386	*54,217,116

South Dist. (35 roads)	42,986.06	54,992,046	65,875,878	*10,683,832
West. Dist. (65 Rds.)	127,768.13	206,690,835	198,248,091	* 8,442,744
Total (165 Rds.)	228,953.96	398,983,151	455,641,355	*56,658,204

*Deficit.

Note: "Net operating income" is the balance of operating revenues after payment of operating expenses, taxes chargeable to railway operation, equipment, and joint facility rentals, and is taken from the monthly returns of the roads to the Interstate Commerce Commission. The entries under "fixed charges" are based upon returns for the year 1918. They comprise interest on funded and unfunded debt, rents for lease of road, corporate and special war taxes not chargeable to railway operation, expenses of maintaining corporate organizations, and other income charges for the current year. Neither dividends nor lapover accounts with the Railroad Administration relating to earlier years are included. Actual fixed charges for 1919 will be somewhat greater than indicated by these figures, and the relative ability of the railway companies to meet these charges somewhat less. "Balance over fixed charges" represents the amount available for dividends, for appropriations, and for surplus. (Id. p. 229.)

In the course of the Senate debate on December 15, 1919, the following transpired:

"Mr. Curtis: Mr. President, I offer the amendment which I sent to the desk.

Mr. Kirby: Mr. President—

The Vice-President: Does the Senator from Kansas yield to the Senator for Arkansas?

Mr. Curtis: I should like to dispose of this amendment. If the Senator wants to ask me a question, I yield.

Mr. Kirby: No; I wanted to suggest the absence of a quorum. I think we ought to have enough Senators here to consider this bill, if we are going on with it. However, I will not make the suggestion.

Mr. Curtis: Let the amendment be disposed of.

The Vice-President: The amendment will be stated.

The Secretary: In line 11, beginning on page 10, after the word 'carriers,' it is proposed to strike out the words 'of which 'Federal control' was relinquished prior to July 1, 1918, as provided in the act of March 21, 1918, this act shall constitute a guaranty for the said 'period,' and insert the following:

"Referred to in the following provision in section 1 of the act of March 21, 1918: 'That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within 'Federal control,' as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit and all the provisions of this act,' and subsequently relinquished regardless of the wishes of the owners: This act shall constitute a guaranty—

(a) to the extent of any actual operating deficit, including taxes, that may have been incurred during the period January 1, 1918, to the date when this act takes effect; and

(b) to constitute a guaranty until expiration of the four months' period heretofore provided in this section—"

Mr. Curtis: Mr. President, the reason for offering this amendment was very well stated a few minutes ago

by the chairman of the committee. I had in mind the road referred to by him, the Kansas City & Northern, and also one other road in the State of Kansas. The Kansas City & Northern had made a net profit of $17,000 the year before it was taken over by the Railroad Administration. The administration took over the road, handled it for a time, refused to make a contract, has taken possession of and retained its terminals, directed the movement of its cars, taken its coal, and diverted its freight, and now that road finds itself in debt from three to four hundred thousand dollars. I am told that when the Railroad Administration put its hands on it the road did not owe a dollar in the world. That is one railroad. There was another road without any indebtedness that has been able to live, but the Railroad Administration has diverted its freight, and so manipulated its affairs that the road will have to stop on the 1st of January if something is not done. This other road, the Kansas City & Northern, has stopped operation, the men have been discharged, and the people along the line who have spent a good many thousands of dollars in building that road are now getting no accommodations whatever.

Mr. Kirby: Mr. President, is it the purpose of this amendment to relieve roads that were first taken over, or sought to be taken over by Government control and afterwards released?

Mr. Curtis: The so-called short lines.

Mr. Kirby: Is it the Senator's idea, then, that they ought to be guaranteed some return hereafter, notwithstanding they have not been under Government control at all?

Mr. Curtis: If the Government has been diverting the freight and managing them and preventing the operation of the road in the usual way, as was the case with

the Kansas City & Northern, and has taken possession of and holds its terminals in Kansas City.

Mr. Kellogg and Mr. King addressed the Chair.

The Vice-President: Does the Senator from Kansas yield; and if so, to whom?

Mr. Curtis: I yield to the Senator from Minnesota.

Mr. Kellogg: Do I understand the Senator to say that as to these two roads the Government has had possession all the time?

Mr. Curtis: It has had possession of one of them, and in the case of the other it has controlled and diverted the freight and agreed to make contracts. The parties have been on here four or five times, but the contracts have never been signed. The Government says it has not had possession. That is a disputed question.

Mr. Kellogg: Mr. President, if the road has been in the hands of the Government, under the Federal control act, it has its claim for compensation during the entire period.

Mr. Curtis: But, Mr. President—

Mr. Kellogg: Just a moment, if the Senator will excuse me, until I get through with my statement. If it is not in the hands of the Government, if it has not been taken over and operated, then if has not a claim for indemnity. We ought not to decide that question in this bill, because there are a great many short lines that were taken over and turned back, and we are not proposing to pay them for the last two years a guaranteed return, and there is no reason why we should pay the Kansas City & Northern for two years if we do not pay them all; and if we are going to open the door now we will open that door to every railroad company in this country which was taken over and then turned back again.

Mr. Curtis: Mr. President, I think the circumstances connected with the Kansas City & Northern justify this

amendment. I do not know that it is drawn so that it will exclude others, but that matter can be very easily handled in conference. It will take but a very short time, and I have no objection to its being changed to meet the situation. The object desired is to have the roads which were taken by the Railroad Administration—or where the greater part of its property was taken and held and where its freight was diverted and it was controlled by the Railroad Administration, and other roads in like condition—fairly treated.

Mr. Kirby: Mr. President—

The Vice-President: Does the Senator from Kansas yield to the Senator from Arkansas?

Mr. Curtis: I yield to the Senator from Arkansas.

Mr. Kirby: Does the Senator expect to have a question of fact determined here by this bill?

Mr. Curtis: No; I do not want a question of fact settled—not at all. If the amendment is not worded now so that it requires a showing to be made to the proper authorities, I would be perfectly willing to have the conferees make such a change of the language so as to leave the question of fact to the Interstate Commerce Commission or to some other organization.

Mr. King: Mr. President, will the Senator yield?

Mr. Curtis: Certainly.

Mr. King: Is not the bill sufficiently broad to include all roads over which the Government has exercised jurisdiction or of which it took possession during the period of the war?

Mr. Curtis: I think not.

Mr. King: That is a question of fact that is easily susceptible of demonstration. If the Government took this road over and did not return it, then, under the bill, the Government would have to meet the guaranty; but if it did take it over and returned it—and that is a fact

easily demonstrated—then it is clear that we ought not to make a guaranty for this road unless, as the Senator from Minnesota says, we guarantee all of them.

Mr. Curtis: But here is the trouble: The Government took the road over and did not make a contract, but it has been directing its management ever since—has full and absolute control of its property, has full control of its terminals in Kansas City, and his diverted freight according to its own desires and ordered that a certain number of cars of freight should be delivered to the line just the same as if it had the legal control. The chairman of the committee made a very fair statement in regard to the treatment of this railroad a few moments ago.

Mr. Cummins: Mr. President, I think the amendment is entirely within the spirit of this bill. We have already made provision in the bill for all these roads that were taken over—and they were all taken over. That does not settle the question of fact. I know they were taken over, because I have seen the notices which were sent out by the Director General about the 1st of January, 1918, in which the Government did undertake to control all of them; but this bill covers those that were dismissed from Government control prior to July 1, 1918. Unfortunately, however, the road of which the Senator from Kansas (Mr. Curtis) speaks was not dismissed prior to July 1, 1918. Therefore, it could not come within the terms of this bill, and it has just as good a right to be within the terms of the bill as any of the other roads. So, while I am not sure that the amendment is drawn just as it ought to be—I have not had an opportunity to review it—I know that the spirit of it is right. I think it ought to be subject to some kind of revision by the conference committee or in some other way.

Mr. Curtis: I am perfectly willing that that shall be done.

Mr. King: Mr. President, as I understood the Senator, he stated that he knows that this road was taken over by the Railroad Administration.

Mr. Cummins: No; I said that I know the facts with regard to the taking over of railroads, because the facts were developed before the Committee on Interstate Commerce.

When the President took possession of the roads on the 27th day of December, 1917, he caused to be sent out—not he, of course, personally, but his Director General caused to be sent out—notices addressed to every rail road in the United States containing a copy of the proclamation which the President had issued, setting forth the war necessity and other things of that kind, and directing the railroads to which the notices were sent to hold themselves for the Government of the United States. I know that subsequently certain persons connected with the Railroad Administration claimed that these railroads had not been taken over, and the injustice of it was so apparent that I introduced a bill, just before the 1st of July, 1918, declaring that these roads were in the possession of the United States and must be dealt with accordingly. The Senate passed the bill and the House passed the bill, and the President vetoed it. Such is my recollection. We are trying in this bill for counsel. These sections are for counsel largely. We are trying to do some tardy justice to these roads, many of which have in fact been ruined by the injustice practiced by the Railroad Administration upon them.

Mr. King: Mr. President, did not the Railroad Administration simply divert the traffic over roads which controlled, over which it exercised jurisdiction, and

whose employees they took under protection and direction, and other roads over which it did not assume jurisdiction, and to which it gave no traffic to, and leave them to obtain just such traffic as they could obtain from the country in which they were operating?

Mr. Curtis: Mr. President, I have stated that in this case I know that they did direct certain traffic to go over this road. I know that they did take possession of the terminals, because the Railroad Administration advised me that they did so. I know that they filled the tracks of the terminals full of cars of other roads. I know that they did advance money to this railroad.

Mr. Cummins: There is no doubt about the Government having taken over the railroad to which the Senator from Kansas refers. Nobody questions that.

Mr. King: Mr. President, it is quite likely, under the statements made by the Senator from Kansas and the Senator from Iowa, that this road ought to come within the provisions of this bill and obtain whatever guaranties other roads obtain. But it does seem to me that we ought to be very cautious about enacting legislation that would give any pretext whatever to roads that the Government did not take possession of to come in and demandthat the Government should guarantee them their earnings during the period of the war.

Mr. Curtis: If the amendment is broad enough for that, it can be modified in conference; and I have already told the chairman of the committee that I should be perfectly satisfied if the conferees made such a change as they thought necessary. There are certain short lines that are entitled to relief.

Mr. King: Let me ask the Senator from Iowa whether the language of the amendment offered by the Senator from Kansas could in any way be tortured in bearing the interpretation that the Government must

pay this guaranteed return to any of the roads throughout the United States which confessedly the Government did not take over?

Mr. Cummins: The question of fact is still open. It is not adjudicated by the bill.

Mr. King: Let me make myself clear. I know a number of small roads which insisted that the Railroad Administration had taken them over under the proclamation made by the President. They were promptly notified that they were not taken over, to continue their operations as they had been operating in the past, and that the Government did not intend to disturb them in the management and control of their own roads; but they have persisted from that time until the present in insisting that the Government had taken them over, although it did not; and, of course, if you permit language that will bear any sort of an interpretation that would include them within the terms of the bill, they will insist that the Government shall pay them this guaranty, the same as it will pay these other roads which unquestionably it did take over and to which it is obligated.

Mr. Cummins: I have not read the amendment of the Senator from Kansas carefully enough to answer that. I only know the spirit of it, and with the spirit of it I am in harmony.

Mr. King: As I understand, the amendment has not been printed?

Mr. Curtis: No; it has not been printed.

Mr. King: It has just been read from the desk, and I would like to ask the Senator if he would object to having it printed and give us an opportunity to examine it.

Mr. Curtis: I have no objection to having it printed and go over until tomorrow.

Mr. Kellogg: On that subject I will state to the Senator from Utah (Mr. King) that when the President

published his order, under the law of 1916, authorizing the Government to take over the railroads, it included all the railroads in the United States in a general description. Afterwards the question arose as to what roads had been taken over and what not, and before the 1st of July, 1918, the President released a large number of railroads in the United States, many of them known as short lines. Those companies have been operating their own railroads from that day to this. They claim, and undoubtedly it is true, that they have suffered by reason of the general rise in wages and operating expenses, and that they could not raise their rates because none of the roads had raised their rates, beyond the one increase of 25 per cent upward. They came to the committee and insisted upon a certain indemnification, and the committee provided that pending the six months after the bill passes they shall be given the same guaranty as the other roads. But it is manifest that if one or two of them are given the guaranty to run clear back to 1918, it will not be possible to leave any of them out, and Congress will have to take care of the entire number of railroads that have been in private operation.

Mr. King: Mr. President, will the Senator permit a question?

Mr. Kellogg: Certainly.

Mr. King: Does the Senator think the Government ought to be burdened with that responsibility?

Mr. Kellogg: It was not the opinion of the committee that the Government ought to assume that, and the committee restricted the relief to the time of resumption after the roads go back.

Mr. King: Does the Senator think the Government ought to pay anything to those roads for the priod from the taking over until the time that the proclamation was issued restoring them, when there was no demand made

to regulate or control them or operate them?

Mr. Kellogg: It was impossible for the committee to examine into one or two thousand railroads scattered over the country, to know to what extent they had suffered or what obligation on the Government was under to them.

Mr. King: Does the bill contain any provision for the method of determining what shall be paid to them?

Mr. Kellogg: Yes; it makes the provision for determining what shall be paid to them.

(Id. 581, 582 and 583.)

Mr. Curtis: I offer an amendment. I will state that it is the amendment I offered last night, which was printed and read, and about which remarks were made by myself and the chairman of the committee. I have nothing more to say about it. The chairman of the committee says he has no objection to it.

The Vice-President: The Secretary will read the amendment.

The Secretary: On page 10, in lines 11 to 14, after the word "Carriers" strike out the words "of which Federal control was relinquished prior to July 1, 1918, as provided in the act of March 21, 1918, this act shall constitute a guaranty for the said period," and insert the following: "referred to in the following provision in section 1 of the act of March 21, 1918: 'That every railroad not owned, controlled or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within Federal control as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this

act;' and subsequently relinquished regardless of the wishes of the owners, this act shall constitute a guaranty (a) to the extent of any actual operating deficit, including taxes, that may have been incurred during the period January 1, 1918, to the date when this act takes effect; and (b) to constitute a guaranty until expiration of the four months' period heretofore provided in this section."

The amendment was agreed to.

(Id. 674.)

Mr. Cummins: Mr. President, in order that the Senate may know precisely the meaning of what I ask, I desire to suggest that at this point I intend to request unanimous consent to take up House Bill 10453.

Following that I shall ask unanimous consent, or make a motion, as the case may be, that in lieu of the amendment proposed to be inserted in said bill—the same being the portion printed in italics—there shall be substituted the Senate bill, which we have been considering, and as amended up to this time.

In connection with that I desire to ask unanimous consent that when the said House bill reaches the Senate those Senators who have reserved amendments made to the Senate bill in the Committee of the Whole for separate votes in the Senate shall have the same rights as respects those amendments incorporated in the House bill, or the same as they would have possessed had the Senate bill continued on its passage.

With that explanation, Mr. President, I ask unanimous consent to proceed to the consideration of House Bill 10453, Calendar 280.

The Vice-President: Is there objection?

There being no objection, the Senate, as in the Committee of the Whole, proceeded to consider the bill (HR 10453) to provide for the termination of Federal control

of railroads and systems of transportation; to provide for the settlement of disputes between carriers and their employees; to further amend an act entitled "An act to regulate commerce," approved February 4, 1887, as amended, and for other purposes, which had been reported from the Committee on Interstate and Foreign Commerce with an amendment, to strike out all after the enacting clause and insert a substitute.

Mr. Cummins: Now, Mr. President, I ask unanimous consent that in lieu of the matter proposed to be inserted in the House Bill, H. R. 10453, there shall be inserted the text of the Senate Bill S. 3288, as amended up to the present time, and that reservations concerning amendments can be made in the Senate upon House Bill 10453 in the same way and to the same extent as though Senate bill 3288 had continued on its way to final passage.

(Id. 884.)

December 17, 1919, in the debate on the Senate Railroad bill, the following transpired:

Senator Pomerene: (Id. 725, 726, 727).

"During the test period recognized under the railroad control act the average earnings based upon the book valuations of the railroads for those three years, one of which was a bad year and the other two prosperous years, about 5.24 per cent."

* * * * *

"The Secretary of the Interstate Commerce Commission late yesterday sent me a reply, and I think I shall read it, because it explains the figures which I shall submit later on. It reads:

'As requested in your letter of this date, I give you herewith the net railway operating income of class 1 roads for each month of 1919, in comparison with the guaranteed amount. The guaranty, of course, is an annual one, but the total amount has been distributed by

months in accordance with the monthly fluctuations in net earnings during the test period. This statement is for the large roads regularly included in our monthly reports of revenues and expenses. It will not agree precisely with the published statements issued by the Director General because of a somewhat different mileage covered by our statements but the discrepancies are not of importance.'

"Now follow the figures. If Senators will permit me, I will just give the round figures, because they will be able to follow them more closely, and I shall furnish the exact figues to the reporter later. In January, 1919, the net railway operating income was $18,700,000. Bear in mind that this sum is subject to the payment of interest and dividends. During the same month the standard return guaranteed by the Government under the railroad control act was $55,400,000, a deficit for that month of January of $36,600,000.

"In February the net railway operating income was $10,100,000, the standard return guaranteed was $46,400,000 and the deficit $36,300,000.

"In March the net railway operating income was $10,800,000. The standard return guaranteed for that month was $67,800,000, a deficit of $57,000,000.

Mr. Hitchcock: Will the Senator explain why the deficit was so much larger and why the requirement was much greater for that month than for other months?

Mr. Pomerene: During the winter months the business of the companies is always less than it is for the late summer and autumn.

Mr. Overman: Does the Senator know why the standard return is so large one month and not so large another month? It seems to me rather strange that in one month it was $56,000,000, whereas the month before it was only $36,000,000.

Mr. Pomerene: That may all be.

Mr. Overman: Why the difference in the standard return

of $20,000,000?

Mr. Pomerene: The Interstate Commerce Commission exacts monthly statements from all the railroads of the country and they are to be filed within 26 days after the month has expired. They take the net earnings, as I understand it, from each of the railroads during each of the three years of the test period and then average them and that makes the rule whereby to give the standard of compensation. In April the net operating railway income was $26,100,000, the standard return guaranteed was $67,100,000, and the deficit $41,000,000. In May the net railway operating income was $39,400,000, the standard return guaranteed $77,700,000, and the deficit $38,300,000.

* * * * * *

Mr. Pomerene: The Senator, I think, was not in the Chamber when I began my discussion of the matter. These are figures furnished to me by the Interstate Commerce Commission. They get monthly reports. The test period was for 1915, 1916, and 1917. As they take the reports for January, let us say, for each of those years they average them and this average makes up the compensation which the Government is to pay the railroads for the month of January during the period of Government control.

Let me take the month of June. The net railway operating income for the month of June was $52,200,000, the standard return guaranteed $83,400,000, the deficit, $31,200,000.

In July the net railway operating income was $77,100,000, the standard return guaranteed $75,600,000, so that for the first time in any month of the year we have a surplus of $1,500,000.

In August the net operating income was $92,000,000, the standard return guaranteed $87,600,000, and again there is a surplus of $4,700,000.

In September the net railway operating income was $77,700,000, the standard return guaranteed $92,100,000, and

again there is a deficit of $14,300,000.

In October the net railway operating income was $76,300,000, the standard return guaranteed $95,100,000, and again there is a deficit of $18,800,000.

So that during the ten months the total net railway operating income was, in round numbers, $481,000,000, and the standard return guaranteed for those months $748,000,000, and the deficit for the ten months is $267,000,000.

The tabulated statement referred and which was furnished by Hon. George B. McGinty, secretary of the Interstate Commerce Commission, is as follows:

Net railway operating income of large roads in the United States by months in calendar year 1919, in comparison with the standard return under the Federal Control Act:

Month	Net Railway Operating Income, 1919	Standard Return Guaranteed	Surplus or Deficit
January	$18,783,702	$55,442,674	**$36,658,972
February	10,106,268	46,493,912	** 36,387,644
March	10,842,608	67,738,212	** 56,895,604
April	26,115,214	67,102,681	** 40,987,467
May	39,462,367	77,729,962	** 38,267,595
June	52,270,702	83,444,790	** 31,174,088
July	77,176,933	75,650,613	*** 1,526,320
August	92,396,635	87,681,468	*** 4,715,168
September	77,763,023	92,122,874	** 14,359,851
October	76,397,213	95,123,649	** 18,726,436
Ten months ending with October	*481,082,531	748,530,835	** *267,448,304

* Includes some corrections made in monthly returns as published.

** Deficit.

*** Surplus.

Now, let us analyze these figures a little further. The computations which I now give were made by the clerks in my office. They are simple and correct.

Senators will remember from the figures I have given that in 8 of the 10 months there was a deficit. The total deficit for the eight months was $273,457,367. There were two months in which there was a surplus, July and August, amounting for the two months to $6,241,488. The average deficit for the eight months was $34,182,207.12, and the average surplus for the two months was $3,120,744. The net deficit for the 10 months was $267,216,169. The net deficit for each of the ten months was $26,721,616.90. The total standard return guaranteed for the ten months was $748,530,835, and the total standard return for 1 month on the average is $74,853,083.50.

Also on the same day, with respect to both the Senate and the House Bills: (Id., 753 and 754.)

Mr. Fletcher: I do not see how that question arises. The House Bill is not the bill on which we are now acting. The House Bill came over here, it is true, but it is not the bill that is now under consideration by the Senate and that will be amended if this amendment is adopted.

Mr. Lenroot: If the Senator from New Jersey will yield to me, I desire to ask the Senator from Florida if he is familiar with what is known as the Curtis rule that changes the entire matter?

Mr. Fletcher: I am not referring to that rule.

Mr. Lenroot: Let me read it to the Senator, and he will at once see that the rule of which he is evidently thinking has been changed. The so-called Curtis rule reads:

"Conferees shall not insert in their report matter not committed to them by either House, nor shall they strike from the bill matter agreed to by both Houses."

When this bill gets to its final stage it will be substituted

for the House Bill; it will then be the House Bill which will be before the conference; and any language that is found either in the Senate amendments or in the House Bill which is identical will not be before the conferees.

Mr. Fletcher: Then, the idea, is to substitute the pending bill for the House Bill; to report the House Bill and amend it by striking out all after the enacting clause and inserting this entire bill?

Mr. Lenroot: Yes:

December 18, 1919, Senator Thomas spoke in part as follows: (Id., 798-9)

> I know that under our agreement with the owners of this property it is our duty to live up to our covenant in all particulars. The Senator from Iowa (Mr. Cummins) led the fight in this body against that part of the present railroad law which fixed the compensation for the use of the roads. He convinced me that the rate was entirely too high, and I still think he was right about it; but the Senate disagreed with him, the House disagreed with him, the bill was passed over that and other objections, and when it became written into the laws of the United States controversy ceased to exist and compliance with its requirements became a public duty.

In Senate report No. 304, by Mr. Cummins, from the Senate Committee on Interstate Commerce, to accompany Senate Bill 3288, it is stated (pages 2 and 3):

> To understand fully the financial statement about to be made, it is necessary to refer to the Federal Control Act under which the Director General of Railroads has been operating about 230,000 miles of our 260,000 miles of railways. Whether the President took possession of all the railways under the act of August 29, 1916, at the beginning of the year 1918, is a subject of controversy into which the committee will not enter at this time. It is sufficient to say that the act of March 21, 1918 (Fed-

eral Control Act), authorized the President to relinquish at any time prior to July 1, 1918, "control of all or any part of any railroad or system of transportation." About July 1, the President exercised this power and relinquished a large number of the shorter lines, retaining, as already suggested, something like 230,000 miles which had been from the 1st day of January, 1918, and still are being operated by the Director General of Railroads.

The Federal Control Act empowered the President to agree with each carrier, whose property was taken over, for the payment of a maximum compensation equivalent to its average annual railway operating income for the three years ending June 30, 1917. Upon this basis the aggregate annual compensation for the use of the railways passing into the hands of the Government and retained until the present time is, in round numbers, $900,000,000.

* * * * *

According to the estimate of the Railroad Administration, the net operating income of the systems in the hands of the Government for the two years 1918 and 1919, will be $551,777,459 less than the compensation to which the carriers are entitled, computed as provided by law and prescribed in the standard contract; that is to say, when all accounts have been adjusted and paid the Government will have lost that amount in its two years of operation. It is the opinion of the committee, without reflecting in any wise upon the Railroad Administration, that in the end the loss will be found to be much greater than the estimate submitted; but however, that may be, it must ultimately be paid for by the Treasury of the United States.

Published as a part of the report is a communication under date of October 22, 1919, addressed to Senator Cum-

mins, from the Director, Division of Finance, U. S. Railroad Administration, where it is stated: (Page 5)

When the Railroad Administration shall have made settlement with the railroad companies in accordance with the foregoing the situation will be as follows: The Railroad Administration will have expended and there will, in consequence, have been correspondingly consumed or tied up.

1. Amount necessary to defray operating deficit, the difference between the standard rental payable to the railroad companies and the estimated net operating income for the 24 months ended Dec. 31, 1919, $551,777,459.

In the Minority Report (Report 304, Part 2) by Senator LaFollette, from the Senate Committee on Interstate Commerce, to accompany S. 3288, it is stated: (Pages 6, 11, 12).

There is no longer a loss chargeable against the Government in operating the railroads as we slowly approach more settled business conditions. The monthly deficit, which has been the object of so much adverse criticism against Government operation, has wholly disappeared, and in its place appears a net monthly profit of millions of dollars.

* * * * *

I direct attention to the following statement showing net gain or loss to the Government from the operation of the railroads for the months from May to September, inclusive, 1919.

* * * * *

Net gain or loss to the Government after allowing for one-twelfth of the annual rental.

Month	*Net Gain*	*Net Loss*
May		$37,642,128
June		26,031,860
July		2,031,547
August	$12,397,112	
September	19,000,000	

* * * *

The most remarkable of all arguments advanced in favor of this bill and against continued Government operation is that the latter is too expensive.

* * * *

In the report of the majority of the committee, at page 3, it is said that the Government will lose as a result of operating the railroads for the years 1918 and 1919 about $550,000,000. Nothing, in my opinion, could be further from the fact. It is true that the Government will pay the railroad companies for the use of railway property for the years 1918 and 1919 about $550,000,000 more than it will receive *net* as operating income.

* * * *

If the figures referred to in the majority report are correct, and it will cost the Government $550,000,000 for this service more than it received *net* in the way of operating income from the roads, it is the best investment of that amount of money which the Government made during the war, and it is utterly fallacious to speak of it is a loss.

Mr. Esch, as Chairman of the House Committee on Interstate and Foreign Commerce, in an address delivered December 13, 1920, which was incoporated in the Congressional Record in the extended remarks of the Hon. Samuel E. Winslow (Vol. 60, Part 5, p. 4569), in a paragraph succinctly stated the extent of the study and consideration given by Congress to the framing of the Transportation Act of 1920. He said: (p. 4570)

Perhaps to no Congress has a more difficult, complicated, or important piece of legslation ever been submitted. Its consideration extended over a period of many months, hundreds of witnesses were heard, and thousands of pages of testimony and exhibits were presented. After four months devoted to hearings and consideration of numerous plans and suggested amendments, the House passed its bill November 17, 1919. The Senate passed the Cummins bill December 19. Two days later both bills were sent to conference. Owing to the wide and radical differences between the bills on highly important matters, it was impossible for the conferees to get action on a conference report by January 1, 1920, the date fixed originally by the President for the return of the roads. The President, therefore, changed the date to March 1, 1920. After eight weeks of continuous and strenuous effort, the conferees reported and the bill was approved February 28.

The Joint Resolution adopted by the 65th Congress respecting short line railroads relinquishment from Federal control was vetoed by the President July 11, 1918.

The action taken by the Senate and House with respect to the adoption of this resolution was as follows:

The Senate: (Vol. 56, Part 9, p. 8496).

Mr. Smith of South Carolina: I ask the Senator from Virginia if he will not yield to me for the purpose of calling up Senate joint resolution 159?

Mr. Martin: I am willing to yield to the Senator to get that measure before the Senate on the same condition that I yielded for the appropriation bill, without the resolution losing its place.

* * * * *

Mr. Smith of South Carolina: The object is this: The Senator from Iowa (Mr. Cummins) introduced an amendment when the bill was on its passage to the

effect that all lines connecting or competing with a line or system taken over by the Government should be considered under Government control as long as the line with which it connected or competed was under Government control. The interpretation of that by the administration under section 14 of the railroad law was that any or all parts of a given railroad could be relinquished without respect to that amendment of the Senator from Iowa. So, the effect of the situation would be this, that under the present interpretation of the act any short line railroad could be relinquished at their will, and as we have already closed the money market by an act of Congress and given them the power to route freight wherever they see fit to carry it, it simply amounts to this, that a short line which was relinquished would be left absolutely helpless, whether it was to live or not. That is the situation.

Mr. Penrose: What does the joint resolution do?

Mr. Smith of South Carolina: It makes it obligatory upon them to hold these short lines as long as they connect and compete with lines taken over.

Mr. Penrose: In the opinion of the Senator from South Carolina, the chairman of the Committee on Interstate Commerce, does this measure meet the complaint of the owners of the short line roads?

Mr. Smith of South Carolina: Absolutely.

Mr. Penrose: In the case of the short line railroads which have not already been taken over, what would happen to them?

Mr. Smith of South Carolina: This will apply to them.

Mr. Penrose: The Government will be compelled to take them over also.

Mr. Smith of Carolina: It will be compelled to take them over also.

Mr. Penrose: I am glad that the committee has done that.

* * * * *

Mr. Hardwick: Mr. President, I merely want to say that I am heartily in favor of the proposal submitted by the Senator from South Carolina in behalf of the Committee on Interstate Commerce. In my judgment, it would not have been necessary to submit this proposition if any reasonable and fair construction had been given to the legislation and to the effect that Congress intended to give to the law.

I am also very heartily in favor for exactly the same reason of the amendment proposed by the Senator from Iowa.

* * * * *

The House: (Id. pp. 8535-6).

Mr. Sims: Mr. Speaker, I ask unanimous consent to take from the Speaker's table Senate joint resolution 159 with reference to short line railroads and pass the same. It is exactly what the House has already passed with a little addition at the end with reference to interurban railroads to which there is no objection.

* * * * *

The Speaker: The Clerk will report the Senate Joint Resolution.

The Clerk read as follows:

Resolved, etc., That the time within which the President may relinquish control of all or any part of any railroad or system of transporttion, further Federal control of which the President shall deem not needful or desirable, as provided in section 14 of said act, be, and it is hereby, extended to and including January 1, 1919; *Provided, however,* that the right conferred upon the President to relinquish prior to July 1, 1918, control of all or any part of any railroad or system of

transportation without consent of the carrier as provided in section 14 of an act approved March 21, 1918, entitled, "An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes," which right is herein extended to and inclusive of January 1, 1919, shall not be construed to include any railroad engaged as a common carrier in general transportation such as mentioned in section 1 of said act not owned, controlled or operated by another carrier company and which has heretofore competed for traffic with any railroad or railroads of which the President has taken and retained possession, use, and control; it being the intent of Congress that every railroad not owned, controlled, or operated by another carrier company and which has heretofore competed for traffic with a railroad or railroads which the President has taken and retains the possession, use or control or which connects with such railroads and is engaged as a common carrier in general transportation shall be held and considered as within Federal control as defined in said act and to be entitled to the benefits of all the provisions of said act so long as the railroad or railroads with which it has heretofore competed for traffic or with which it connects shall be retained under Federal control; *Provided further*, That nothing in this resolution or in the said act of March 21, 1918, shall be construed as requiring the President to take or retain the possession, use and control of any street railway, whether the same be owned, controlled or operated by another carrier company or not, nor to require the President to take or retain the possession, use and control of any interurban or similar railroad which does not receive at least 25 per cent of its operating revenue from the transportation of freight, and which prior to December 29,

1917, did not have through routes or joint rates with one or more steam-road carriers."

The Speaker: The question is on the third reading of the Senate joint resolution.

The Senate joint resolution was ordered to be read a third time, was read the third time, and passed.

On motion of Mr. Sims, a motion to consider the vote by which the Joint Resolution was passed was laid on the table.

66th Congress) (Report
1st Session) (No.456

HOUSE OF REPRESENTATIVES
RETURN OF RAILROADS TO PRIVATE OWNERSHIP.

November 10, 1919.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. Esch, from the Committee on Interstate and Foreign Commerce, submitted the following:

REPORT (In Part)

(To accompany H. R. 10453)

The Committee on Interstate and Foreign Commerce, to whom was referred the bill H. R. 10453 to provide for the termination of Federal control of railroads and systems of transportation; to provide for the settlement of disputes between the carriers and their employees; to further amend the act entitled, "An Act to regulate commerce," approved February 4, 1887, as amended, and for other purposes, having considered the same report thereon with the recommendation that it pass.

Work of the Committee.

H. R. 4378, introduced June 2, 1919, constituted the basis for the hearings held by the committee.

* * * * *

The Pending Bill.

The policy pursued by the committee in framing the pending bill was not to adopt new and untried plans, but rather to build on a structure already in existence, whose foundations were well laid. In the period of reconstruction when conditions are still unsettled and the public mind is in more or less of ferment resulting from the World War, it was thought wise not to make experiments with the largest single industry in the United States, outside of agriculture, but what the committee sought to do in the bill now presented, was to provide for an adjustment of financial relations between the carriers and the Government arising out of Federal control and to provide, during the brief period of reconstruction, for financial support and for temporary relief in the way of loans, as might be asked for by the weaker roads.

* * * * *

Guaranty to Railroads After Termination of Federal Control.

Section 207 provides that during the six months following the termination of Federal control the United States guarantees to each railroad at any time under Federal control that its railway operating income for such guaranty period as a whole shall not be less than the average of its railway operating income for the three corresponding periods of six months each during the three years' test period ending June 30, 1917. If the road was not meeting expenses during the test period the guaranty is of the amount by which the deficit for the guaranty period exceeds the average deficit for the three corresponding periods during the test period.

ACTION TAKEN REGARDING FEDERAL CONTROL ACT.

CALENDAR NO. 225

SENATE

65th Congress) (Rept. 246
2d Session) (Part 1.

FEDERAL CONTROL OF TRANSPORTATION SYSTEMS DURING THE WAR.

February 7, 1918—Ordered to be printed.

Mr. Smith, of South Carolina, from the Committee on Interstate Commerce, submitted the following:

REPORT (In Part)

(To accompany S. 3752)

The Committee on Interstate Commerce, to whom was referred the bill (S. 3752) to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes, have considered the same and report thereon with the recommendation that the bill do pass without amendment.

On August 29, 1916, Congress enacted the following: The President in time of war is empowered through the Secretary of War to take possession and assume control of any system or systems of transportation or any part thereof, and to utilize the same to the exclusion, as far as may necessary, of all other traffic thereon for the transfer or transportation of troops, war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

Under this statute and by virtue of all other power enabling him, the President, on December 28, 1917, took possession and control of the railroad systems of con-

tinental United States and the owned or controlled systems of coastwise or inland water transportation. He appointed Hon. William G. McAdoo, Director General of Railroads.

Since December 28, he has been operating those systems of transportation for war and national purposes. There was no provision in the act of August 29, 1916, for determining the just compensation due as a constitutional right to the owners of the properties thus taken over for public purposes. It therefore became necessary to provide the proper legislation to meet the two very important needs; first, the proper judicial machinery for determining the amount of just compensation thus accruing; secondly, to give to the President the authority to offer the owners of the property thus taken just and reasonable terms for compensation which, if accepted, will determine finally and completely all rights as between the Government and the owners, thus avoiding the delays incident to litigation and giving strength and stability to the security market and rendering assistance to our future war financing.

The President, in his proclamation, instructed the Director General to—

enter upon negotiations with the several companies looking to an agreement for just and reasonable compensation for the possession, use, and control of their respective properties on the basis of an annual guaranteed compensation above accruing depreciation and the maintenance of their properties, equivalent, as nearly as may be, to the average of the net railway operating income thereof for the three-year period ending June 30, 1917.

You committee were of opinion that this is the time for war emergency legislation and not the time to settle the many controversial and vexed questions concerning

our future transportation policy.

With these preliminary observations your committee submits a brief explanation of the various sections of the bill:

Section 1.

Section 1 authorizes the President to agree with the carriers whose property has been taken over that during the period of Federal control each carrier may receive as just compensation—in lieu of all rights arising under due process of law—an annual sum not exceeding its average annual railway operating income for the three years ended June 30, 1917, plus a return at a rate to be fixed by the President upon the cost of additional facilities made during the last six months of 1917, the amount of such net earnings and the cost of such additional facilities to be determined by the Interstate Commerce Commission and certified to the President. This is in substance the President's suggestion. The certification of the commission is to be taken as conclusive for the purpose of such agreement. Any operating income in excess of such standard return is to be paid into the Treasury of the United States and placed in the revolving fund provided by section 6 of this act.

About 75 great operating railroads do over 90 per cent of the railroad business. It is believed by your committee that most of these great railroad carriers will accept these terms as a just and fair measure of their constitutional rights. Section 1 further provides that ordinary taxes, National and State, shall as now, be paid out of operating revenue; but war taxes accruing under the act of October 3, 1917, are to be paid by the companies out of their own funds, or charged against the standard return. In other words, the holders of railroad securities are by section 1 (like holders of other securities) to bear their own just portion of the war

burden. Section 1 also requires that each agreement shall contain adequate and appropriate provisions for the maintenance and depreciation of the property and the creation of any reserves or reserve funds found necessary in connection therewith; so that the properties may at the end of Federal control be returned to the owners in a condition substantially equivalent to their condition when taken over by the Government and that proper adjustments both in the standard return and in the terms of final settlement may be made. Thus even-handed justice will be worked out as between each company and the Federal Government.

If the rights of all the railroads making returns to the Interstate Commerce Commission are fixed under the provisions of this section, the Government will guarantee approximately $945,000,000 a year.

Since the preparation of this summary, however, the committee has amended Section 1 by inserting a provision authorizing a return, at such reasonable rate as the President may determine upon the cost of additional transportation facilities made during the last six months of 1917. This addition, of perhaps ten to fifteen millions, is made in the interest of equality, it appearing that two hundred to two hundred and fifty millions of additional capital has during the last half of 1917 been put into transportation facilities by a comparatively few of the carriers taken under Federal control.

There has, of course, been much discussion as to the fairness and justice of the proposed amount of the standard return. It should not be overlooked that the gist of the question is, what would these companies be likely to receive from the courts as just compensation? The amount of just compensation is not a legislative question—it is a judicial question. (Monongahela Navigation Co. v. U. S., 148 U. S., 312.) It follows, in the

opinion of your committee, that much of the evidence and discussion concerning the so-called surplus is irrelevant. It is plainly in the public interest—and indeed a war need—that the President be authorized to offer to settle with the owners of these properties on a basis apprxoimately equivalent to that which sound-thinking men would advise the owners they would be likely to receive by court decision. The rights of such owners must be tested by present conditions—not by some theory of capitalization never made operative under Federal or State law or generally followed by the courts.

Questions of value are always difficult questions. It is highly probable, if not certain, if the whole question were remitted to the courts, they would take as the basis for determining just compensation, the actual net earnings for a reasonable period. During the last three years new investment in the properties now under Federal control has been at the rate of approximately three hundred and seventy-five millions a year. The year ended June 30, 1915, was one of the poorest in recent railroad history. The other two years have been prosperous years. The average of the three years therefore reflects neither poverty nor riches. The purchasing power of the dollar accruing to the stockholder, as well as to the wage earner, has decreased. Dividends in industrial companies have largely increased. The rate of return upon Government bonds, both abroad and in the United States, has largely increased.

The percentage of return upon the value of the railroad property taken under Federal control cannot be accurately stated; for until the Federal valuation, now in process, is completed, no one knows the value of that property. The book value may be taken for certain comparative purposes, as of some significance; it must not be regarded as accurate. The proposed standard re-

turn, figured upon the book value of all the companies will give a return not far from 5.32 per cent. Comparing this return to that which accrues to the purchaser of Government bonds, it seems large; but Government bonds run for a period of 25 or 30 years. The proposed guarantee to the owners of railroad securities may run for only a few months. The government is practically a tenant at will.

After the most careful consideration your committee are of the opinion that the owners of these properties would not be unlikely to receive an award from a court at least equal to the proposed offer; that it is therefore the duty of Congress to authorize the President to make such offers as will prevent patriotic and fair-minded American citizens from resorting to litigations, in time of war, in order to determine their rights against their government.

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IN THE

In the Supreme Court of the United States.

OCTOBER TERM, 1933

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, Petitioner,

v.

THE UNITED STATES OF AMERICA

REPLY BRIEF OF THE PETITIONER

Petitioner respectfully submits this brief in reply to the brief of the United States.

SUMMARY OF ARGUMENT

1.

The original order of the Interstate Commerce Commission construing Section 204(a) made March 4, 1920, did not represent the views of the Commission, but was in fact an order staying the operation of the section to all save "red ink" roads, until the subject might be given mature consideration.

2.

The classification of railroads on the basis of those having test period returns and those not having sufficient test period returns, or none at all, accords with the history of the legislation and the language of the act itself.

3.

The use of the word "deficit" to mean a difference or decrease in earnings during the control period as compared with the test period is supported by legislative history and by the use of the word "deficit" in the title of Section 204 and in Section 212(a) of the Act as well as in Section 204.

4.

The case of *Wisconsin Central Railroad Company* v. *United States*, 164 U. S. 190, and the case of *Crowell* v. *Benson*, 285 U. S. 22, relied upon by the Government are clearly distinguishable from the case at bar.

5.

In construing Section 204 in conjunction with Section 212(a) of the Act, it is clear that the certificates issued under either section by the Interstate Commerce Commission are final and conclusive, and the absence of the words "conclusive and final" as found in the Dent Act, *Work* v. *Rives*, 267 U. S. 175, does not militate against the conclusiveness of the certificates herein, for that an express declaration in the Act to the effect that the certificate is final is not more controlling than the express declaration of this Court in *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, to the effect that certificates issued under Section 212(a) are "final and conclusive."

The equities of the petitioner set forth in the answer cannot be disposed of by the quotation from the case of *Wisconsin Central Railroad Company* v. *United States*, 164 U. S. 212, quoted by the Government (Resp. Br. 38) for the reason that no equities on behalf of the railroad company were either pleaded or shown according to the records in that case. The record expressly states that no inequity would be visited upon the railroad by reason of the receipt of the moneys from the Post Office Department, and the Court in that opinion recognized that moneys illegally paid may be recovered back "where no peculiar circumstances appear to make such recovery inequitable and unjust." If the respondent is required to repay the money to the Government in this case, it will suffer substantial injury. The Government does not offer to place the petitioner in *statu quo*. Seeking equity, the Government must do equity.

ARGUMENT

1. The Original Order on Section 204(a) By the Interstate Commerce Commission, March 4, 1920, Did Not Represent the Views of the Commission.

The so-called first ruling (Resp. Br. 5) did not in fact reflect the views of the Interstate Commerce Commission as to the construction of Section 204(a), but simply stayed the operation of the Section to all save "red ink" roads, until the subject could have mature consideration.

> "This announcement was made out of abundant caution at a time when we had had no opportunity to give to the section, especially to paragraph (a) thereof, the critical and mature consideration essential to its correct interpretation."

Construction of the word "deficit", 66 I. C. C. 765, 766.

2. Classification of Railroads on the Basis of Test Period Returns Accords With the History of the Legislation.

The Government contends (Resp. Br. 24) that Section 204 should be construed as classifying railroads into two classes:

1. Railroads having earnings in excess of expenses.
2. Railroads having expenses in excess of earnings.

This does not accord with the history of the legislation, or the language of the section.

The Federal control act classified railroads into two classes: :

1. Those having test periods, and,
2. Those having no test periods, or insufficient test periods.

This latter classification is adopted in the Transportation Act. It is a reasonable basis for classification.

It is a matter of common knowledge that of the hundreds of Shortline roads coming within the terms of the Transportation Act, there were but few of such recent construction as to not have at least one year's operation in the test period, and while as to some of these few roads discrimination might result, it could not be avoided as they had not sufficient test period operations by which the loss, if any, they suffered could be determined.

3. As To the Legislative History and the Word "Deficit"

The Government contends (Resp. Br. 26) that the "petitioner relies principally upon speeches and discussions by

individual members of Congress on the floor of the Senate and the House" and that such "speeches and discussions" under the authority of *Omaha Street Railway* v. *Interstate Commerce Commission,* 230 U. S. 324, 333, may not be considered by this Court in determining the legislative purpose.

In that case the question was whether or not a street railroad was included within the definition of the word "railroad" as used in the Act. Reference was had to the Congressional Record wherein the Chairman of the Senate Committee during discussion had stated that a "street railway" was not intended to be included. The Court concurred in the view of the Commerce Court that the meaning of the statute could not be determined from statements made in debate. On reading the case, however, we find that the Court held that the word "railroad" did not in fact include a "street railway" so that the language is *obiter dictum.*

The Government then says (Resp.. Br. 26-27) "the authoritative history of a statute consists of the committee report and statements by those actually in charge of the bill", citing *United States* v. *Missouri Pacific Railroad Company,* 278 U. S. 269. The vital references in petitioner's Brief and Appendix herein are within this rule, as reiterated and enlarged upon in the case of *United States* v. *Great Northern Railway Company,* 287 U. S. 144, 154 (Pet. Br. 9-10).

Reference to the legislative history discloses that Senator Pomerene was the ranking majority member of the Committee on Interstate Commerce of the Senate and one of the "managers on the part of the Senate" of this bill when it was pending before that body, and further that he was a member of the Conference Committee which reported the bill as finally passed. Therefore, recourse can be had to the statements made by Senator Pomerene as found in the Congressional Record, disclosing his use of the word

"deficit", namely that it meant the difference between the standard or test period earnings and the earnings during federal control.

Furthermore, in connection with the remarks of Senator Pomerene as disclosed by this record (Pet. Br. 26-28) the Senator presented to the Senate a tabulated statement furnished to him by Hon. George B. McGinty, then Secretary of the Interstate Commerce Commission, showing that the Interstate Commerce Commission, in tabulating and comparing the standard return guaranteed (the test period earnings) and the net railway operating income of all roads for the year 1919, designated such difference a "surplus" or "deficit", as the case might be. So that, not only Senator Pomerene, as one of the managers of the bill and as a member of the committee to which it was referred, used the word "deficit" exactly as the petitioner asserts the Congress intended, but also the Interstate Commerce Commission furnished to the Senate a tabulated statement containing information for use in connection with the passage of this bill, which tabulated statement shows that the Interstate Commerce Commission and its accounting department, which necessarily made up this tabulated statement, used the word "deficit" to denote the difference between the test period return and the control period return.

Now let us look to the Senate Report No. 304, Part 1, submitted by Senator Cummins. (App. to Pet. Br. 85-88.) It appears from this report that the committee incorporated therein and made a part thereof a communication addressed to Senator Cummins from the Director, Division of Finance, United States Railroad Administration, wherein it is stated, among other things:

> "1. Amount necessary to defray operating deficit, the difference between the standard rental payable to the railroad companies and the estimated net operating income for the 24 months ended December 31, 1919, $551,777,459."

In the minority report (Report No. 304, Part 2), (App. to Pet. Br. 87), by Senator LaFollette, it is stated:

> "There is no longer a loss chargeable against the Government in operating the railroads as we slowly approach more settled business conditions. The monthly deficit, which has been the object of so much adverse criticism against Government operation, has wholly disappeared, and in its place appears a net monthly profit of millions of dollars."

Again we find that both the majority report and the minority report of the Committee use the word "deficit" as meaning exactly what the petitioner herein contends it should be construed to mean; and that the Division of Finance of the United States Railroad Administration in its communication addressed to Senator Cummins, contained a statement to the effect that the "deficit, the difference between the standard rental payable to the railroad companies and the estimated net operating income" amounted to more than a half million dollars.

The communication from the Director and the communication from the Interstate Commerce Commission are a part of the legislative history to which recourse is had by this Court.

A letter from President Hoover to the Chairman of the Finance Committee of the Senate was referred to by this Court as a part of the legislative history in *Norwegian Nitrogen Prod. Co.* v. *United States,* decided February 6, 1933, 53 Sup. Ct. Rep. 350, 355.

In addition to the foregoing, petitioner's brief and appendix disclose that the history of the period preceding and accompanying the passage of this Act and the known mischief to be remedied, as well as the general trend of debate in both Houses, compel the conclusion that Congress meant to deal with the shortline railroads on the same basis, as far as might be, as it dealt with the trunk line roads.

"The underlying purpose of Congress was the same in both cases." *Continental Tie and Lumber Co.* v. *United States*, 286 U. S. 290, 294.

The rule was stated and applied by this Court in *Atlantic Cleaners and Dyers* v. *United States*, 286 U. S. 427, 435 (cited in Petitioner's Brief at page 25), as follows:

> "A consideration of the history of the period immediately preceeding and accompanying the passage of the Sherman Act and of the mischief to be remedied, as well as the general trend of debate in both Houses, sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed. In passing Section 1, Congress could exercise only the power conferred by the commerce clause; but in passing Section 3, it had unlimited power, except as restricted by other provisions of the Constitution. We are, therefore, free to interpret Section 3 dissociated from Section 1 as though it were a separate and independent act, and thus viewed, there is no rule of statutory construction which prevents our giving to the word 'trade' its full meaning, or the more extended of two meanings, whichever will best manifest the legislative purpose. We perceive no reason for holding that Congress used the phrase 'restraint of trade' in Section 3 in a narrow sense."

Notwithstanding this legislative history showing the use of the word "deficit" to denote the difference between test period returns and control period earnings by the Managers of the Bill, the Committee, the Interstate Commerce Commission, and the United States Railroad Administration, we find in the Government's Brief (p. 15) the following:

> "'Deficit' is essentially an accounting term which is *universally* accepted to mean that the earnings from a business during a stated period are less than the costs incurred." (Italics ours.)

If further proof be necessary to disprove this statement, we need only refer to Section 212(a) (App. Pet. Br. 32) of the Act itself. This section provides for the issuance of certificates under Section 204 or Section 209 by the Commission in advance of a final determination of the amount due a railroad under either section.

To illustrate, if a carrier, which connected with or competed for traffic with a controlled road, operated its own road during any portion of the Federal control period, and likewise operated its road during the test period, which carrier claimed earnings of $250,000 in the test period and a loss of $50,000 in the control period, and had presented its claim to the Commission for $300,000, and if the Commission was "not at the time able finally to determine the whole amount due under such section", the commission might "make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates until the whole amount due has been certified." (Section 212(a).) Assuming that the Commission "definitely ascertained" that $150,000 would be due this carrier, it might issue a partial certificate therefor, and it might later, upon finally determining the whole amount due, issue a final certificate for the balance.

Section 212(a) further provides "warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for payment in respect to *reimbursement of a carrier for a deficit during the period of Federal control*, out of the appropriation made by Section 204;" (Italics ours.) (Section 212 (a).)

In this section the Congress used the phrase "deficit during the period of Federal control" to mean the amount which is ultimately paid to the carrier, whether it be a "test period" road or not.

In the illustration given above, if the railroad which presented its claim was finally paid under Section 212(a) by

one or more partial certificates and a final certificate, it would be paid its entire "deficit", namely the difference between its test period earnings and its control period earnings, and "deficit" as used therein necessarily means such difference and not a "red ink" balance, except where it might apply to roads without sufficient or no test periods.

Compare the title of Section 204 with the phrase used in Section 212(a) and it compels the conclusion that the word "deficit" means the same in both.

> Title of section 204. (App. Pet. Br. 22.)
> "Reimbursement of Deficits During Federal Control."
> Phrase in Section 212(a).
> "Reimbursement of a carrier for a deficit during the period of Federal control."

As to "test period" railroads, in both cases "deficit" means, not a "red ink" figure, but the difference between the "test period" earnings and the "control period" earnings.

Therefore, instead of the word "deficit" being *universally* accepted to mean excess of expenses over revenue as contended by the Government, the position of the petitioner that the word "deficit" denotes the difference between test period returns and control period earnings is supported by such use of the word—

1. By the managers of the bill.
2. By the Majority Committee report.
3. By the Minority Committee report
4. By the Interstate Commerce Commission.
5. By the United States Railroad Administration.
6. By the Congress in Section 212(a) and in the title of Section 204.

4. Wisconsin Central Railroad Company v. United States, 164 U. S. 190, and Crowell v. Benson, 285 U. S. 22, Distinguished. (Resp. Br. 31-34)

The Government, to sustain its right to disregard the decision of the Commission, holding that the petitioner came within subdivision (a) of Section 204, states that "The question whether a particular carrier was within the purview of the section is purely judicial, for that question is fundamental or 'jurisdictional'." (Resp. Br. 33.) The Government concedes that the Interstate Commerce Commission was authorized under the Act to make a judicial decision to determine what carriers came within the Act. The Commission, therefore, had jurisdiction to consider the question. Having jurisdiction to consider the question, the conclusions reached by the Commission, whether right or wrong, do not affect its jurisdiction.

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits * * *. Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction."
>
> General Investment Company *v.* N. Y. C. R. R. 271 U. S. 228, 230.

In the *Wisconsin Central Railroad* case, the railroad company was engaged among other things in the transportation of the United States mails. Under the then existing law, if it were a land grant railroad it would receive but 80 per cent of the standard rates prescribed by Congress. The railroad contended it was not a land grant railroad within the meaning of the Statute. The Postmaster General, by a mistake, agreed that it was not a land grant road; and it was paid, over a period of time, full statutory rates. Later the Postmaster General, conceiving it to be a land

grant road, and entitled only to the lower rate, withheld from its later accounts the excess payments theretofore made, and the suit followed. The railroad was held to be a land grant road. It also contended that:

> "it was not competent for the Postmaster General to withhold the moneys thus paid without authority of law, as the previous directions to make the payments were decisions binding on the department; because the payments were voluntarily made on due consideration and deliberation and the accounts settled * * *."
>
> Wisconsin Central Railroad Company *v.* United States, 164 U. S. 190, 205.

This Court answered:

> "The Postmaster General in directing payment of compensation for mail transportation, under the statutes providing the rate and basis thereof, *does not act judicially*, and whatever the conclusiveness of executive acts so far as executive departments are concerned, as a rule of administration, it has long been settled that the action of executive officers in matters of account and payment cannot be regarded as a conclusive determination when brought in question in a court of justice." (Italics ours.)
>
> Wisconsin Central Railroad Company *v.* United States, 164 U. S. 190, 205.

It is also pointed out by the Court that Section 4057 of the Revised Statutes requires the Postmaster General to cause suit to be brought to recover excess payments made from the funds of the Post Office Department under fraudulent representations or by mistake. *Wisconsin Central Railroad Company v. United States*, 164 U. S. 190, 210, 211.

That case is, therefore, distinguished from the case at bar, on at least two grounds:

(1) The Interstate Commerce Commission acts judicially; the Postmaster General does not;

(2) The Statute directed that action be brought by the Postmaster General; the Transportation Act makes no provision for the maintenance of any action by or on behalf of the Government either directly, by appeal, review, or otherwise.

The Government next relied upon *Crowell* v. *Benson*, 285 U. S. 22 (Act of March 4, 1927, c. 509; 44 Stat. 1424 U. S. C., Title 33, Sec. 901-950). This law provided for compensation in respect of disability or death resulting "from an injury occurring upon the navigable waters of the United States" and it applied *only when the relation of master* and servant existed. It is pointed out in the decision that before Congress had power to legislate on the subject, these two things must concur, namely, the relation of master and servant, and employment upon the navigable waters of the United States. Congress had no power to pass any general compensation law.

That case is clearly distinguishable from the case at bar on at least two grounds:

1. Section 21 of that Act provides for a review of the compensation orders made by the Deputy Commissioner who administers the Act, and that action was brought pursuant to said section authorizing such review.

2. It was not a subject over which the Congress had general jurisdiction. The constitutional rights of citizens were invaded unless the relation of master and servant existed and unless the injury occurred upon the navigable waters of the United States. The citizen, therefore, had a right to have those questions of his constitutional rights determined by the Courts and not by Congress, or its agency.

As to the first ground, petitioner has pointed out in its

brief that no right of appeal or review of the action of the Interstate Commerce Commission as a special tribunal in the administration of the Transportation Act is provided, whereas in the case of *Crowell* v. *Benson*, Section 21 of the Act specifically provided for a review.

As to the second ground, namely, the constitutional question involved, it was without the power of Congress to legislate upon the subject, except in a limited way, and the citizen had a right to a judicial determination of the question as to whether or not Congress exceeded its power.

The Court points out the difference between that case and cases such as the case at bar in the following language:

> "In relation to the Federal Government, we have already noted the inappositeness to the present inquiry of decisions with respect to determinations of fact, upon evidence and within the authority conferred, made by administrative agencies which have been created to aid in the performance of governmental functions, and where the mode of determination is within the control of the Congress."
>
> Crowell *v.* Benson, 285 U. S. 22, 57.

As examples, the Court referred to the Land Office Department; Post Office Department; Bureau of Internal Revenue; and the Labor Department's activities as to the admission and deportation of aliens.

The Government recognizes this in its Brief (p. 34) and states:

> "The case at bar does not fall within the class of cases which the opinion in that case distinguished (pp. 57-58) from the decision therein, for in this case the Commission was not exercising its power as an agency of Congress to regulate commerce."

We grant that the Interstate Commerce Commission was

not exercising its power as an agency of Congress to regulate commerce, but we submit that it was exercising its power as an agency of the Congress in the administration of Title II of the Transportation Act, and particularly of Section 204 thereof.

No one can question that Congress had full power to make such adjustments with the railroads of the country as in its judgment seemed wise; in fact, Congress was not required to establish an agency to investigate and determine what railroads were entitled to reimbursement, and the amounts thereof, but might have made these determinations for itself and made direct appropriations of specific sums of money for each and every railroad in the United States which it thought entitled thereto. No constitutional limitations could be urged against the powers of Congress in that regard, and hence there was no necessity for providing for a judicial review of any decision made by any agency which it might designate to carry out its purposes.

5. Construing Section 204 In Conjunction With Section 212(a), It Is Immaterial That the Words "Conclusive and Final" Do Not Appear In This Act As In the Dent Act. (Work v. Rives, 267 U. S. 175).

In the Government's brief (p. 34) is the following statement:

> "Section 204 is silent with respect to finality or Court review of the Commission's action. The decision of the Circuit Court of Appeals, therefore, is not in conflict with this Court's decision in *Work* v. *Rives*, 267 U. S. 175, or other decisions construing the Dent Act prior to amendment, because that Act then expressly declared that the decision of the Secretary of the Interior was 'conclusive and final'."

It is true that Section 204 is silent as to finality. However, it cannot make any difference whether the Act expressly declares a decision to be final, or whether this Court expressly holds a decision to be final. Certificates issued under Sections 204 and 209 by virtue of the provisions of Section 212(a) of the Transportation Act are final, although there is no express declaration in Section 212(a) that such certifications are "conclusive and final." *United States* v. *Great Northern Ry. Co.* 287 U. S. 144.

Section 212(a) provides among other things:

> "SECTION 212(a). In making certifications under Section 204 or Section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier * * * may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by Section 204; * * *." (App. to Pet. Br. 32.)

Certificates issued pursuant to this section, whether in partial payment or in final payment, are "conclusive and final" under the ruling of this Court in the case of *United States* v. *Great Northern Ry. Co.* 287 U. S. 144.

A "partial" certificate issued to a shortline carrier under Section 212(a), payable "out of the appropriation made by Section 204", is final; therefore, a "final" certificate issued under Section 204 itself must be final.

6. As to the Equities of the Petitioner

The Government, in disposing of the equities of the petitioner, relies solely upon the case of *Wisconsin Central*

Railroad v. *United States*, 164 U. S. 190, 212, quoting as follows: "* * * parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them." (Resp. Br. 38.)

The complete sentence of which this quotation is a part reads as follows: "We concur in these views and are of opinion that there is nothing on this record to take the case out of the scope of the principle that parties receiving moneys illegally paid by a public officer are liable *ex acquo et bono* to refund them." In other words, the Court did not rule in the *Wisconsin Central* case that "all" moneys illegally paid by a public officer might be recovered, but held that in that particular case, there was nothing on the record which justified taking the case out of the general principle just stated. The Court recognized that there were exceptions to this rule, and stated:

> "It is unnecessary to go into a discussion of the exceptions which may exist between private parties to the rule that moneys paid through mistake of law could not be recovered back."
>
> Wisconsin Central Railroad Company *v.* United States, 164 U. S. 190, 211.

This contention was disposed of by this Court on the authority of *Duvall* v. *United States*, 25 C. Cl. 46, wherein that Court said, referring to this principle:

> "That money paid in violation of law upon balances certified by the accounting officers *generally* may be recovered back by counter claim or otherwise; *where no peculiar circumstances appear to make such recovery inequitable and unjust.*" (Italics ours.)
>
> Wisconsin Central Railroad Company *v.* United States, 164 U. S. 190, 211.

The Court of Claims found that:

> "The only effect which the misrepresentation of the Post Office Department has caused is that the claimant.

by reason of over payment, has had in its possession money which it was not entitled to have, and that it has had it without the payment of interest."

Wisconsin Central Railroad Company *v.* United States, 27 C. Cl. 440, 469.

Therefore, it was expressly decided that there were no circumstances in connection with the receipt by the railroad company of this money which would invoke the rule, which is thus stated:

"The principle that forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself against loss at the expense of an innocent and blameless defendant."

Keener on Quasi-Contracts, page 67.

The loss, injustice and inequity which will be visited upon the petitioner if the Government prevails in this case are clearly set forth in the affirmative defense of the petitioner in its amended answer (R. 50-54), wherein it appears:

1. That the petitioner filed its claim only after the Interstate Commerce Commission had ruled (66 I. C. C. 765, Finance Docket 1600) that petitioner came within the Act, and that for the preparation, filing and presentation of its claims it expended in excess of $30,000.
2. That after receipt of the money it paid out $375,000 to its stockholders as dividends.
3. That its taxes were increased by reason of the receipt of the money.
4. That if compelled to make repayment, it will be insolvent.

These allegations are all admitted.

"This suit is not to enforce any contract, express or implied, but it seeks to invalidate a settlement con-

tract that has already been performed, and that without either the willingness expressed or the power possessed to restore the parties to their previous status. By this suit, the Government forecloses and excludes all those equitable considerations and plastic powers which a chancellor could exercise were this a bill to rescind the agreement of settlement."

D'Olier Engineering Co. *v.* United States, 244 Fed. 90, 94.

In this kind of an action, where it is shown that injury will result to an innocent and blameless defendant, the plaintiff must place the defendant in *statu quo*, as a condition precedent to its right to recover.

If this action were between two citizens of this Government, no doubt could be entertained but that recovery would be denied. The Government should not be permitted to visit loss, injustice and inequity upon its citizens in any case where the citizen would be protected against his fellow citizens under like circumstances. There is not one law for the Government and another for the citizen.

Like the citizen, when the Government seeks equity, it should do equity.

Respectfully submitted,

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In the Supreme Court of the United States

IN THE

OCTOBER TERM, 1933

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, Petitioner,

v.

THE UNITED STATES OF AMERICA.

SUPPLEMENTAL APPENDIX TO PETITIONER'S BRIEF

CHRONOLOGY OF DECISIONS OF THE INTERSTATE COMMERCE COMMISSION AFFECTING PETITIONER'S CLAIM AND OF ACTION THEREON

1.

February 9, 1922. Construction of the word "deficit," 66 I. C. C. 765, wherein the Interstate Commerce Commission construed the word "deficit" to mean the difference between the test period operations and the control period operations.

2.

After February 9, 1922 and before March 20, 1925 (record does not show date), petitioner filed its claim with the Interstate Commerce Commission.

3.

March 20, 1925. Deficit settlement with Butte, Anaconda & Pacific Railway, 94 I. C. C. 617, wherein the Interstate Commerce Commission allowed petitioner's claim in the sum of $487,116.31 in settlement of all claims against the Governmment under Section 204 and certified said amount to the Secretary of the Treasury.

4

March 26, 1925. The claim in the above amount was paid by the Treasurer of the United States to the petitioner.

5.

October 17, 1925. Deficit status of Bingham & Garfield Railway Co., 99 I. C. C. 724, wherein the Interstate Commerce Commission reversed itself on the meaning of the word "deficit" and held the word to mean a "red ink" figure.

6.

January 8, 1927, the Interstate Commerce Commission issued an order to the petitioner to show cause why the certificate theretofore issued it should not be cancelled and its claim dismmissed.

7.

March 7, 1927. Deficit settlement with Butte, Anaconda & Pacific Railway, 117 I. C. C. 780, wherein it was ordered that the certificate theretofore issued to the petitioner was cancelled and its claim dismissed.

8.

June 8, 1928. Repayment of the amount certified was demanded of petitioner by the Secretary of the Treasury and refused.

9.

August 23, 1929. The complaint herein was filed in the District Court of the United States for the District of Montana.

ORDER.

At a session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 8th day of January, A. D., 1927.

FINANCE DOCKET NO. 2602.

DEFICIT SETTLEMENT WITH THE BUTTE, ANACONDA & PACIFIC RY.

Whereas, The Commission, by Division 4, on the 20th day of March, 1925, issued a report in the above-entitled

proceeding and did certify to the Secretary of the Treasury of the United States that the amount payable to the said Butte, Anaconda & Pacific Railway Company under the provisions of paragraphs (f) and (g) of section 204 of the Transportation Act, 1920, was $487,116.31; and

Whereas, The record in said proceeding shows that said company received a net railway operating income for that portion (as a whole) of the Federal control period during which it operated its own railroad or system of transportation; and

Whereas, This Commission subsequently, to wit, on the 17th day of October, 1925, in Finance Docket No. 2500, *Deficit Status of Bingham & Garfield Railway Company*, 99 I. C. C., 724, decided, in effect, that the provisions of said section are not applicable to any carrier which received a net railway operating income for that portion (as a whole) of the Federal control period during which it operated its own railroad or system of transportation.

It is ordered, That the said proceeding in Finance Docket No. 2602 be, and it is hereby, reopened for hearing before Assistant Director C. V. Burnside, at Washington, D. C., on the 28th day of January, 1927, at 10 o'clock A. M., for the purpose of affording the said Butte, Anaconda & Pacific Railway Company opportunity to show cause why the certificate issued in said proceeding on the 20th day of March, 1925, should not be revoked and the claim in said proceeding dismissed.

It is further ordered, That this order be served upon said Butte, Anaconda & Pacific Railway Company and that a copy thereof be sent by mail to the Secretary of the Treasury of the United States.

By the Commission, Division 4.

(SEAL) GEORGE B. McGINTY,
Secretary.

FINANCE DOCKET NO. 2602.
DEFICIT SETTLEMENT WITH BUTTE, ANACONDA & PACIFIC RY.

Submitted March 1, 1927. Decided March 7, 1927.

On further hearing and reconsideration, and following *Deficit Status of Bingham & Garfield Ry. Co.*, 99 I. C. C., 724, the provisions of section 204 of the transportation act, 1920, held not to be applicable to the Butte, Anaconda & Pacific Railway Company. Original report, 94 I. C. C., 617. Certificate issued March 20, 1925 cancelled, and claim dismissed.

Ben B. Cain, L. O. Evans and Warren Nichols for Butte, Anaconda & Pacific Railway Company.

Ben B. Cain for American Short Line Railroad Association.

REPORT OF THE COMMISSION ON FURTHER HEARING AND RECONSIDERATION

DIVISION 4, COMMISSIONERS MEYERS, EASTMAN, AND WOODLOCK. BY DIVISION 4:

In the original report in this proceeding, issued March 20, 1925, we found that the amount payable to the Butte, Anaconda & Pacific Railway Company under the provisions of section 204 of the transportation act, 1920, was $487,116.31, and a certificate to that effect was issued to the Secretary of the Treasury. The claim of the carrier, filed with us, indicated that it received in the period from July, 1918, to February, 1920, inclusive, a net railway operating income of $256,855.19. Our examination of the carrier's accounts has shown that the correct amount of net railway operating income received in that portion of the Federal control period during which the carrier operated

its own railroad was $239,525.13. Our report recited that the settlement proposed was based upon the commission's report of February 9, 1922, in Finance Docket No. 1600, *Construction of the Word "Deficit,"* 66 I. C. C., 765. In the report thus cited the commission held that the word "deficit" as used in paragraph (a) of section 204 meant a decrease in net railway operating income in the Federal control period as compared with the corresponding months of the test period. Subsequently, however, and since the issuance of the original report and certificate in this proceeding, we have held, in substance, in *Deficit Status of Bingham & Garfield Ry. Co.*, 99 I. C. C., 724, that the words "Deficit in its railway operating income," as used in paragraph (a) of section 204, should be construed to mean an excess of charges over credits to railway operating income for the period under consideration.

Pursuant to the latter construction of the law, we issued an order on January 8, 1927, reopening the proceeding and setting a hearing for the purpose of affording the Butte, Anaconda & Pacific Railway Company opportunity to show cause why the certificate issued on March 20, 1925, should not be revoked and its claim dismissed. Such hearing was held on March 1, 1927, at which the carrier was represented by counsel, who filed a special appearance merely for the purpose of filing a protest, the essential portion of which is as follows:

> Said Butte, Anaconda & Pacific Railway hereby objects to and protests against the action of the Interstate Commerce Commission in entering its order of January 8, A. D. 1927, and/or in entering or attempting to enter any other or further orders whatsoever, and/or in taking or attempting to take any other or further action whatsoever in said above entitled Finance Docket No. 2602, for the reasons that said Interstate Commerce Commission was and is wholly without right, power and/or authority to

enter said order of January 8, A. D. 1927, and to enter or to attempt to enter any other or further order, or to take or to attempt to take any other or further action whatsoever in said above-entitled Finance Docket No. 2602.

The President of the American Short Line Railroad Association, who appeared as counsel for the carrier, also requested leave to file as *amicus curiae* copies of an argument presented by him in behalf of the American Short Line Railroad Association on November 4, 1921, in Finance Docket No. 1600, requesting its consideration in view of the bearing of the present proceeding upon the settlements heretofore made under section 204 with a large number of other carriers. Such argument has been fully considered by us.

Upon further hearing, reconsideration of the record, and following our conclusion in *Deficit Status of Bingham & Garfield Ry. Co., supra,* we find that the provisions of section 204 of the transportation act, 1920, are not applicable to the Butte, Anaconda & Pacific Railway Company. An order will therefore be issued canceling our certificate of March 20, 1925, and dismissing the claim of that company.

ORDER.

Entered March 7, 1927.

Further hearing and investigation of the matters and things involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report on such further hearing and investigation, containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the certificate issued in said proceeding on March 20, 1925, be, and it is hereby, revoked and cancelled.

It is further ordered, That the claim of the said Butte, Anaconda & Pacific Railway Company in said proceeding be, and it is hereby dismissed.

And it is further ordered, That this order be served upon said Butte, Anaconda & Pacific Railway Company, and that a certified copy thereof be sent by mail to the Secretary of the Treasury of the United States.

117 I. C. C., 780.

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 768

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a Corporation, petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

While we believe that the decision of the court below was correct and that there is no conflict of decisions, we do not oppose the granting of a writ in this case. We are informed by the Interstate Commerce Commission that under its original construction of Section 204 of the Transportation Act of 1920 (see Pet. 2), the sum of approximately $3,000,000 was paid to seventy-four carriers, including the petitioner. The court below has held that the United States is entitled to recover the sum paid to petitioner because this construction of the statute by the Commission was erroneous, as the

Commission itself subsequently concluded. (See Pet. 2.) We are also informed by the Interstate Commerce Commission that there are in its files approximately sixty claims involving nearly $6,000,000, which are similar to the claim of the petitioner, and upon which the Commission has refused payment. If the decision of the court below is incorrect these claims would undoubtedly be pressed by the carriers involved.

As the amount involved in cases turning upon the construction of Section 204 is large, and establishment of the other claims may involve extensive litigation in various circuits unless the question is finally settled by a decision of this Court, we believe that the case merits review and, therefore, we do not oppose the granting of a writ of certiorari herein.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

APRIL, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 8

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, petitioner

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 82) is reported in 61 F. (2d) 587. The first opinion of the District Court overruling petitioner's demurrer to the complaint (R. 10) is reported in 38 F. (2d) 871. The second opinion of the District Court sustaining the Government's demurrer to the answer to the complaint is not officially reported, but is printed in the Record at page 37.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 7, 1932 (R. 95). A petition for rehearing before that court was filed December 6, 1932, and was denied January 16, 1933 (R. 96). Petition for certiorari was filed in this Court on March 13, 1933, and granted April 17, 1933 (289 U.S. 717). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 204, Transportation Act, 1920, in providing for payment of any carrier as therein defined "which sustained a deficit in its railway operating income" while operating its own railroad during the Federal control period, authorized payment not only of carriers which operated at an actual loss, but also those which operated at a profit, though a diminished profit, during the control period as compared with the test period.

2. Whether, if the first question is answered in the negative, the Interstate Commerce Commission's certification of a payment based upon its misconstruction of the term "deficit" was final and conclusive, and deprived the courts of jurisdiction to construe that term in an action to recover the unauthorized payment.

3. Whether recovery by the Government of money paid to petitioner upon an erroneous construction of "deficit" by the Commission may be

denied on the ground (1) that petitioner accepted the money in good faith and has since disbursed it, or (2) that the payment was a "compromise" of petitioner's claim.

STATUTE INVOLVED

Section 204, Transportation Act, 1920 (c. 91, 41 Stat. 460; U.S.C., Title 49, sec. 73, as amended March 4, 1927, c. 510, 44 Stat. 1446), is set out in the Appendix, *infra,* pp. 40–43. For convenient reference, the portions of Sections 209 and 212 of that Act and Sections 1 and 14 of the Federal Control Act, to which reference is made in the argument, are also set forth in the Appendix, *infra,* pp. 43–56.

STATEMENT

This is a suit to recover $487,116.31, paid to petitioner by the Secretary of the Treasury upon a certificate issued by the Interstate Commerce Commission upon a misconstruction of Section 204, Transportation Act, 1920.

Petitioner is a steam and electric railroad company, which, during Federal control of railroads, was engaged as a common carrier in operating between Butte and Anaconda, Montana, a line of railroad 25.3 miles in length, which connected with the Northern Pacific Railway Company, a carrier under Federal control. Petitioner's road was under Federal control from January 1, 1918, to September 27, 1918, when it was relinquished by the Director General of Railroads, acting in pursuance of

his express power under Section 14 of the Federal Control Act. From September 28, 1918, to February 29, 1920 (when Federal control terminated) petitioner itself operated the road. During the latter period, petitioner earned a profit or railway operating income of $239,525.13 (R. 3.) It filed with the Interstate Commerce Commission its claim for reimbursement of an alleged railway operating income "deficit" of $600,527.35 under Section 204.

That section provided for payments to certain carriers which, among other things, had sustained deficits in their railway operating incomes while privately operating their own roads during Federal control. Paragraph (a) described and defined the carriers entitled to reimbursement. To bring itself within the definitive language of that paragraph it was necessary for a carrier to show that it, first, engaged as a common carrier in general transportation, and, second, competed for traffic or connected with a railroad under Federal control, and third, "sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation." If a carrier met these three requirements, it was entitled to payment, not in the amount of its control period deficit but in whatever amount resulted from computations to be made by the Commission as detailed in paragraphs (b) to (f), inclusive.

Paragraph (b) provided that railway operating income or any deficit therein for the Federal control period should be computed in a manner similar to that provided in Section 209 with respect to such income or deficit for the guaranty period, (Appendix 40), and that such income or deficit for the test period should be computed in the manner provided in Section 1 of the Federal Control Act (Appendix 40). Paragraph (g) required the Commission to certify to the Secretary of the Treasury the amounts payable to carriers which met the three definitive requirements of paragraph (a).

The Commission first ruled, on March 4, 1920, that carriers which did not sustain a railway operating deficit—that is, an actual loss, while privately operating their own roads during the control period, were not entitled to payment under Section 204, and issued an order requiring carriers to furnish, on a form prescribed by the Commission, the data necessary for its use in determining what carriers were entitled to payment and the amount thereof. (See *Construction of the Word "Deficit"*, 66 I.C.C. 765, 766; and R. 11.)

But the Commission thereafter reconsidered the meaning of the word "deficit", and, after receiving briefs from and hearing arguments of interested parties, it rendered its decision in *Construction of the Word "Deficit", supra* (February 9, 1922), in which it changed its first ruling and held that the term "deficit in its railway operating income" as

used in Section 204 meant "a deficiency in income under private operation in the Federal control period,[1] as compared with the average income for corresponding portions of the test period.[2]"

Upon that construction, the Commission determined that petitioner was entitled to $487,116.31, and on March 20, 1925, issued its certificate accordingly to the Secretary of the Treasury, who paid that amount to petitioner (R. 47–49; and 94 I.C.C. 617).

But, again, in *Deficit Status of Bingham & Garfield Ry. Co.*, 99 I.C.C. 724 (October 17, 1925), the Commission reconsidered its decision of February 9, 1922, and came to the conclusion that its ruling of March 4, 1920, was correct. It held "that the words 'deficit in its railway operating income' as used in Section 204 of the Transportation Act, 1920, mean an excess of railway operating expenses over railway operating revenues, computed as therein provided."

Inasmuch as petitioner had not sustained a loss, but had, on the contrary, operated at a profit of $239,525.13 during the control period, it was not,

[1] The term "Federal control" means the possession, use, control, and operation of railroads and systems of transportation, taken over or assumed by the President, during the period December 28, 1917, to March 1, 1920.

[2] The "test period" is the three-year period ending June 30, 1917. The railway operating incomes of carriers during that period were adopted by Congress as the basis for determining the measure of compensation to railroads which were under Federal control.

under this interpretation, a "carrier" entitled to any payment under Section 204. The Government then demanded refund of the amount previously paid to petitioner, and the demand was refused. Whereupon this suit was brought to recover, alleging that the Commission's construction of the term "deficit", upon which payment had been made, was erroneous and unwarranted, and that the true and correct meaning of the term was an actual loss from operation; that is, an excess of expenses over income. (R. 2–7.)

The District Court overruled petitioner's demurrer (R. 8), held that "deficit" meant an actual loss or "red-ink balance", and sustained its own jurisdiction to construe the statute and determine whether it authorized any payment to a carrier which made a profit while operating its line during Federal control (R. 10–17). Petitioner then answered (R. 17–33), and admitted the essential facts alleged in the complaint, but denied liability, and set up, as affirmative defenses, that, (1) because the Commission had reduced the amount of the claim, and petitioner had accepted the amount certified "in final settlement of all of its claims against the United States" under Section 204, the Government was estopped from asserting a right to recover; (2) because petitioner had accepted the amount in good faith and had expended it in payment, among other things, of dividends to stockholders, state taxes, and Federal income taxes, recovery should be

denied "in sound morals and good conscience"; and (3) because the personnel of the Commission had changed between the rendition of its two opinions construing the word "deficit", its last action was without authority. The Government then demurred (R. 34–36) to the answer. The demurrer was sustained, except as to petitioner's claim for credit or deduction of Federal income taxes paid out of the amount received. (R. 37–40.) The District Court then entered judgment for the Government. (R. 60–61.)

The Circuit Court of Appeals affirmed the judgment of the District Court in all material respects. (R. 82–94.)

SUMMARY OF ARGUMENT

I

Payments under Section 204 were not "in any sense just compensation for the taking of property", for the carriers which were to receive payments "were during the time to which the section applied in the possession and management of their owners." That section provided "partial redress" to the carriers therein defined for "consequential losses" resulting from Federal control. *Continental Tie & L. Co.* v. *United States,* 286 U.S. 290, 294. The payments were based upon "equitable and moral considerations" and not upon vested rights. See *Work* v. *Rives,* 267 U.S. 175, 181.

1. "Deficit" is an accounting term which is customarily and universally accepted to mean an excess of expenses over income, and the courts below correctly held that Congress so used it not only in the definitive provisions of paragraph (a) but throughout Section 204. No confusion arises if the term is given its normal meaning throughout the section, but if not accorded that meaning in paragraph (a), then the use of the word in the definitive provision of that paragraph must be wholly ignored in construing the section, and this is required by petitioner's construction. Its construction is also contrary to the necessary meaning of the term "deficit" as used in paragraph (f) of that section, and in Section 209. The Circuit Court of Appeals correctly held that the meaning of "deficit" as used in the definitive or "jurisdictional" provisions of paragraph (a) could not be subordinated to or enlarged by the subsequent paragraphs, which merely provide the method of computing the amounts payable to the carriers defined in paragraph (a); and that, if a carrier sustained an actual loss while operating its line during Federal control, then the amount of its payment was to be worked out by means of the calculations required to be made under the subsequent paragraphs, but that if it had not sustained such loss, then it had no right to any payment. That court's decision is correct, and is in harmony with the decision of this Court in *Continental Tie & L. Co.* v. *United States, supra.*

2. It is futile to argue that the Government's construction gives to carriers which operated at a small deficit during Federal control an unfair advantage over those which had but a small profit, for some discrimination results from either the petitioner's or the Government's construction. But more discrimination results from petitioner's construction than from the Government's, for the former discriminates against carriers within the same profit-earning class, while the latter causes no discrimination among any carriers within the same class, although it recognizes the difference in treatment which paragraph (f) compels between carriers which operated more than a year and those which operated less than a year of the test period. But it was within the right of Congress to define the class of carriers entitled to benefits under the section, even though some difference in treatment resulted.

3. The authoritative legislative history of Section 204 and similar provisions relating to Federal control and its termination do not support the view that Congress intended, by that section, to compensate all carriers regardless of whether they operated at a deficit or at a profit during Federal control. Speeches of individual members of Congress may not be used in construing the statute. *Omaha Street Ry.* v. *Int. Comm. Comm.*, 230 U.S. 324, 333; *United States* v. *Missouri Pacific R.R. Co.*, 278 U.S. 269. That Congress did not intend to treat all car-

riers alike in the matter of compensation during and as a result of Federal control is clear from the provisions of the statutes which it enacted.

II

The courts below were not bound by the Commission's interpretation, and they had jurisdiction to construe the statute and determine whether the payment to petitioner was lawful and within the Commission's authority. This power has been exercised by this Court in a long line of familiar decisions sustaining the right of the Government to recover an unauthorized payment: *Wisconsin Central Railroad Co.* v. *United States,* 164 U.S. 190; *Grand Trunk Western Ry. Co.* v. *United States,* 252 U.S. 112; *United States* v. *Burchard,* 125 U.S. 176. Jurisdiction to determine whether Section 204 included carriers of petitioner's class was either in the courts or in the Commission, and if not in the courts, then the Commission's power to reconsider and revoke its first action must be sustained. But under this Court's decision in *Crowell* v. *Benson,* 285 U.S. 22, the courts below clearly had jurisdiction.

III

Recovery may not be denied on the ground that petitioner accepted the payment in good faith and has since disbursed the money. If the statute conferred no right to the payment, then petitioner acquired none by the Commission's misconstruction, and it is liable under the principle announced by

this Court in *Wisconsin Central Railroad Co.* v. *United States, supra,* at p. 212, that "parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them." Nor does the claim that the payment was a "compromise" prevent recovery, for the Commission had no authority to "trade" or "compromise" with respect to petitioner's claim.

ARGUMENT

I

THE COURTS BELOW AND THE COMMISSION IN ITS FIRST RULING AND LAST DECISION WERE RIGHT IN HOLDING THAT SINCE PETITIONER MADE A PROFIT, IT WAS NOT ENTITLED TO A PAYMENT UNDER SECTION 204

By Section 204 Congress provided for payments to carriers which had sustained deficits in their railway operating incomes while operating their own lines during Federal control. The carriers affected were principally short lines, like petitioner's, technical control of which the President had assumed by proclamation at the beginning of the Federal control period, but which had been relinquished after a few months. Payments under that section, therefore, were not "in any sense just compensation for the taking of property", but were provided as "partial redress" for "consequential losses" which Congress presumed that those carriers sustained as a result of Federal control of railroads with which they connected. *Continental Tie & L. Co.* v. *United States,* 286 U.S. 290. Such payments were based upon "equitable and moral

considerations", and not upon vested rights. See *Work* v. *Rives*, 267 U.S. 175, 181. Just compensation for the "taking" of actual possession and control of the carriers' property before relinquishment had already been provided in Federal Control Act (40 Stat. 451).

Payments under Section 204 were limited to carriers which sustained deficits in net "railway operating income." That phrase was used in its literal sense to distinguish other kinds of income.

Paragraph (a) of the Section described and defined the carriers entitled to payments thereunder. The definitive language of that paragraph stated three prerequisites, all of which a carrier had to meet in order to establish any right to payment. These were (1) prior engagement in general transportation, and (2) connection or competition with a carrier under Federal control, and (3) a "deficit in its railway operating income" while operating its line during Federal control. Petitioner admittedly, for the purposes of this suit, met the first two requirements, and this controversy centers upon the question whether, having privately operated its line at a profit of $239,525.13 during the control period, it met the third. Whether it did, depends upon the meaning of the term "deficit in its railway operating income" used in that section.

The courts below and the Commission, in its first ruling and its last decision, held that the term meant an actual loss, that is, an excess of operating

expenses over operating revenues, and that the section authorized payments only to those carriers which the Commission found in its first or preliminary step to have incurred such actual loss during the whole period that they operated their lines within the control period. In other words, they held that if the Commission's preliminary examination showed that a particular carrier sustained a loss while privately operating its line during the control period, that carrier was then entitled to a payment in whatever amount resulted from computations to be made by the Commission in the manner prescribed in paragraphs (b) to (f), inclusive; but that if such preliminary examination showed that the carrier made a profit from such private operation, then it was entitled to nothing under the section, and the Commission was not required to proceed with the second step of making computations.

Petitioner contends that Section 204 provides for payment not only of those carriers whose private operation during Federal control resulted in a loss, but also to those whose operation was at a profit during the control period, though a diminished profit for that period as compared with their profit during the test period. It claims in this suit $487,116.21, by which amount its profit during the test period exceeded its profit during Federal control.

Petitioner argues that this construction of the section is compelled (1) by the correct definition of

the word "deficit", (2) to avoid discrimination between carriers which earned small profits and those which operated at small deficits during the control period, and (3) by congressional policy, as disclosed in the legislative history of Section 204 and other provisions, to provide reimbursement of all carriers to the full extent of any diminution in their incomes during the control period as compared with the test period, regardless of the fact that some were under Federal control and some were not.

We think the Circuit Court of Appeals was right in rejecting these views, and in holding that Section 204 provided for payment only of those carriers which sustained an actual loss while operating their own lines during Federal control.

1. THE DECISIONS BELOW ACCORD TO THE TERM "DEFICIT" ITS NORMAL AND ACCEPTED MEANING AND ARE IN HARMONY WITH THIS COURT'S DECISION IN CONTINENTAL TIE & L. CO. v. UNITED STATES, SUPRA

"Deficit" is essentially an accounting term which is universally accepted to mean that the earnings from a business during a stated period are less than the costs incurred. The courts below so construed it, and petitioner itself concedes that this is its normal and accepted meaning, for its brief states at p. 22 that "if the word 'deficits' in this title is construed in the technical accounting sense, the title would not be descriptive of the subject matter."

But Congress undoubtedly used the term in Section 204 in its technical accounting sense, for it was

there used to describe or refer to the financial condition of the defined carriers as shown by their books or accounts. In other words, it was only by an accounting examination and a balancing of the carriers' expenses against their revenues that it could be determined whether a carrier had a deficit. It is only in its accounting sense, therefore, that the term "deficit" would have any application to the subject matter.

Petitioner's contention that the term "deficit" as used in section 204 includes not only an actual loss but also a mere diminution in control period return as compared with test period return does not rest upon doubt or ambiguity with respect to the meaning of the term itself, as used either in the definitive provisions of paragraph (a) or in subsequent paragraphs, but upon the fact that the section requires the Commission, in computing the amount payable to a carrier which sustained a "deficit", to make monthly comparisons of its control period returns with its test period returns. The contention in reality is that a carrier's right to a payment is not to be tested by the condition stated in the definitive provisions of paragraph (a), namely, that it must have operated at a deficit, but wholly by the fact that its operating income was less during the control period than in the test period. The contention ignores the distinction between the provision regarding the *right* to payment and the subsequent provisions regarding the *measure* of payment.

This view also ignores and renders entirely meaningless the term "deficit in its railway operating income", for, if a mere diminution of income between the two periods is the criterion of a carrier's right to payment, then the definitive use of the term in paragraph (a) is, as stated by the District Court (R. 14), "wholly unnecessary and superfluous", for Congress needed only to omit the term in paragraph (a) and carriers having mere diminished returns would clearly be entitled to payment.

No confusion arises if the term "deficit" is given its normal and accepted meaning wherever used in the several paragraphs of Section 204. It is used thirteen times in the entire section. It first appears in paragraph (a), and the remaining twelve times in paragraphs (b) to (f), inclusive, which set forth the method of computing the amount payable to the carriers already defined in paragraph (a). Each time the term appears in paragraphs (b) to (f), it is necessarily used in its accounting sense, that is to mean an excess of operating expenses over operating revenues. If the term is not given its normal meaning in those paragraphs, it is obvious that the computations therein required could not be made, for the monthly comparisons of control period returns with test period returns necessarily mean nothing more than a comparison of the financial results, in terms of the relation between revenues and expenses, during the two periods. For example, paragraph (c) requires the Commission, as the first step to be taken

in making the computations, to ascertain for every month during which a particular carrier operated in the test period, the existence of its deficit in the literal sense for both periods, and the result of this ascertainment is the foundation of the comparison required to arrive at the amount payable. Clearly, the word "deficit" is used in its literal sense in paragraph (f), and no other contention is made by either party in this case. The use of the expression "as a whole" in both paragraphs (a) and (f) further indicates that the test of a carrier's right to payment is to be determined by ascertaining the financial results of the *whole* period of private operation and not by making monthly comparisons.

The Commission said (99 I.C.C. 727–8):

> * * * we are doubtful about the propriety of giving the term "deficit" a meaning in connection with certain provisions of the section which differs materially from the meaning attributed to that term in connection with other provisions of that section. It will be seen that in paragraph (a), which is the jurisdictional paragraph of the section, the term "deficit" is used only once, and then simply for the purpose of describing the carriers to be covered by the section. This indicates that in determining the question of jurisdiction the term cannot be applied in one way in one case and in a different way in another case, and since the term "deficit", used in the latter part of paragraph (f) of the sec-

> tion, must be confined to what is often referred to as a red-ink balance, that is, a case where the carrier's operating revenues are less than its operating expenses, a like meaning should be given to the term as used in other portions of the section.

The Commission also pointed out that the construction urged by petitioner is contrary to that which it had accorded the word "deficit" as used in Section 209, and in making certain computations under paragraph (b) of Section 204. It states (99 I.C.C. 728):

> In administering the provisions of section 209, commonly called the guaranty section of the transportation act, we construe the term "deficit" which appears in paragraph (3) of subdivision (c) and also in subdivision (i) of that section as meaning the excess of operating expenses over operating revenues, and this is the meaning customarily attributed to that term in railroad parlance. A pertinent portion of subdivision (i) reads:
>
> "If for the guaranty period as a whole the American Railway Express Company does not have a deficit in operating income, it shall forthwith pay the amount of its operating income for such period into the Treasury of the United States."
>
> This shows that Congress used the term "deficit" to distinguish a case where operating expenses exceed operating revenues from a case where operating revenues exceed operating expenses.

> In computing, under section 204, railway operating income, or any deficit therein, we are required by paragraph (b) of the section to include in the computation certain taxes and debits and credits arising from equipment rents and joint-facility rents, as provided in section 209 and in section 1 of the Federal Control Act of March 21, 1918, and such computations are intended to be included in the expressions "excess of operating expenses over operating revenues" and "excess of operating revenues over operating expenses", as used by us in this report.

The error in interpreting the word "deficit", not upon the face of paragraph (a) where it is used with reference to the *right* to payment, but in the light of subsequent paragraphs which provide for the *measurement* of payments was pointed out by the Circuit Court of Appeals (R. 89) thus:

> It seems to be admitted that the terms of subdivision (a) of Section 204, taken alone, entitles a carrier to compensation only when it operated at a loss during the control period. It is argued, however, that this construction is affected by the provisions of subdivisions (c), (d), (e), and (f), which prescribe the method by which the deficit is to be ascertained. This argument is without force when it is considered that subdivision (a) explicitly defines the carrier as to whose income the subsequent provisions are to be applied; the latter provisions are necessarily subordinate to the class definition contained in subdivision (a).

As explained by that court, the several paragraphs of the section, read together, operate and apply consistently and logically (R. 90):

> The construction to be given to the section as a whole seems not to be doubtful. The carrier, under subdivision (a), first determines whether it has suffered a loss in its operating income as a whole, for the period of Federal control and while it was not under Federal control. If it has suffered such a loss, then the amount of its reimbursement is to be worked out by means of the calculations required to be made under (c), (d), (e), and (f). If it has not suffered such a loss, it has no right to reimbursement. This construction appears to be in harmony with the purpose of Congress.

We think the decision of the Circuit Court of Appeals is correct and that it is entirely harmonious with the decision of this Court in *Continental Tie & L. Co.* v. *United States, supra,* wherein it was said, at p. 294, concerning short lines privately operated during Federal control that:

> Congress, nevertheless, realized that federal operation had caused them consequential losses, at least partial redress for which was the purpose of the section where *actual deficits* in income had resulted. (Italics ours.)

There is not, as claimed by petitioner, a conflict between this Court's decision in that case and the decisions below, for the point decided in that case was that money received by a carrier pursuant to

Section 204 was income taxable for the year 1920, and not a tax-free gift within the meaning of the Revenue Act of 1918. The statement by the Court that Section 204 " directed the Commission to compare the results " of private operation during Federal control with those of the test period, and if less favorable in the former, " to award an amount calculated as prescribed by the section ", does no more than paraphrase the language of the section itself.

Nor is the decision below in conflict with the decision in *Cripple Creek & Colorado Springs* v. *Interstate Commerce Commission,* 11 F. (2d) 554 (certiorari denied, 273 U.S. 706). In that case the court merely refused a writ of mandamus to compel the Commission to treat certain carriers as a " combined system of transportation " in considering a claim under Section 204.

2. MORE DISCRIMINATION RESULTS FROM PETITIONER'S CONSTRUCTION THAN FROM THE GOVERNMENT'S

The argument (Br. 39) that the Government's construction gives to carriers which operated at a small deficit during Federal control an unfair advantage over those which had but a small profit, is futile. Both the Government's and the petitioner's construction results in disadvantage to some carriers. On this point the Commission aptly said (99 I.C.C. 728):

> It is true that if the term "deficit", wherever it appears in the section, is construed

as meaning only a red-ink balance, as aforesaid, some discriminations may result in connection with the period of Federal control, between carriers who had small net operating incomes on the one hand and those whose operating revenues were less than their operating expenses on the other, but it is also true that such a construction will lessen to some extent discriminations, brought about by our ruling of February 9, between the carriers covered by the latter portion of paragraph (f) and carriers who enjoyed net operating incomes during the period of Federal control.

Petitioner's own theory results in a discrimination between carriers within the diminished-income class. Thus one such carrier operating for a year and a day within the test period would receive payment, but a similar carrier operating for a day less than a year would receive no payment, because it is excluded by the terms of paragraph (f). But, under the deficit theory of the Government, all carriers within the deficit class will receive some payment irrespective of whether they operated a year and a day or for less than a year of the test period. For example, under petitioner's theory, a road which operated for a year and one day during the test period, and which made a profit of $1.00 during Federal control, and a larger profit during the test period, would be reimbursed on the basis of its full test period income, whereas, with the same Federal control profit the same road would get nothing if

it operated for one day less than a year during the test period. For the amount of reimbursement to carriers which operated for less than a year during the test period is expressly limited by paragraph (f) to the amount of their actual deficit or loss.

The Government's theory, while recognizing the distinction created by paragraph (f) between roads that operated a year or more and those that operated less than a year of the test period, nevertheless, results in no discrimination among roads in the same financial class or condition. Because, although the road which operated a year and a day of the test period and had a deficit of $1.00 during Federal control would have the benefit of the greater compensation resulting from test period comparisons while the road which operated for a day less than a year of the test period and had a control period deficit of $1.00 would only get its deficit, both of these roads, being in the same "deficit" class, would be reimbursed to some extent.

The Government contends that the statute is clear. If this be so, resultant discrimination is immaterial because, as was stated by the Circuit Court of Appeals (R. 91), it is within "the right of Congress to define the class of carrier entitled to benefits." But, if it be urged that the statute is not clear and that the less discriminatory meaning should be given to the statute because Congress is to be presumed to have intended the more reasonable and fair result, this weighs in the Government's favor and not in favor of petitioner, because,

as above demonstrated, there is less discrimination under the Government's theory than under the petitioner's.

The classification for which the Government contends is both sensible and fair. As pointed out above, the Government was not discharging an obligation for the "taking" of property, but was, out of an abundance of solicitude, voluntarily extending aid. It is a fair presumption that Congress felt that its purpose would be served if it drew the line between carriers which made a profit and those which operated at a loss, and that sufficient had been done when it aided only those which sustained a loss. It is immaterial that different treatment is accorded a carrier which made a profit of $1.00 and one which lost $1.00—that is characteristic of all classifications.

The reasonableness of this was apparent to both the lower courts and to the Commission. The Commission observed, in *Deficit Status of Bingham & Garfield Ry. Co.*, 99 I.C.C. 727, that applicants such as petitioner were—

> carriers whose net railway operating incomes for the portions of the period of Federal control during which their lines were operated privately were so large that . . . they should be regarded by the carriers' stockholders as very satisfactory, and (the Commission found) it difficult to believe that Congress intended to enact a law which would enable the latter class of car-

riers to withdraw sums of money from the Treasury of the United States and thus augment the comparatively large returns they have already received.

3. THE AUTHORITATIVE LEGISLATIVE HISTORY OF SECTION 204 DOES NOT SUPPORT THE VIEW THAT CONGRESS INTENDED TO COMPENSATE NOT ONLY CARRIERS WHICH HAD DEFICITS BUT ALSO THOSE WHICH HAD MERELY A DIMINISHED INCOME DURING FEDERAL CONTROL

To support its argument (Br. 26–39) that the legislative history of Section 204 compels its construction of "deficit", petitioner relies principally upon speeches and discussions by individual members of Congress on the floor of the Senate and the House. Extracts from these speeches, which discuss not only Section 204 but the guaranty provision of Section 209 and other sections of the bill under consideration, are set forth at pages 33–93 of the appendix to petitioner's brief. These speeches show that there was not only much disagreement among members with respect to the treatment which should be accorded the carriers, but also confusion and misunderstanding of the various provisions of the proposed bill. We understand that, probably because they reflect not the final purpose of the legislative body as a whole but merely the views of individual members, speeches made in course of debate on legislation are not to be used in construing a statute, *Omaha Street Ry.* v. *Int. Com. Comm.*, 230 U. S. 324, 333, and that the authoritative history of a statute consists of the

Committee report and statements by those actually in charge of the bill, *United States* v. *Missouri Pacific R.R. Co.*, 278 U.S. 269.

That Congress did not intend payments to carriers which had merely a diminished income during the control period as compared with the test period, but intended payment only of those which had an actual loss during Federal control, is clearly indicated in the several statutory enactments relating to Federal control and its termination. In the exercise of his power to take possession and control of railroads for purposes of the War (39 Stat. 645) the President, by blanket proclamation, announced on December 28, 1917, that he had taken possession and control of "each and every system of transportation" engaged in general transportation. On March 21, 1918, Congress enacted the Feneral Control Act (40 Stat. 451), Section 1 of which recites that the President had taken possession and control of "certain railroads." Section 14 of that Act expressly authorized the President to relinquish, prior to July 1, 1918, control of all, or any part, of any railroad deemed not needful or desirable. The last sentence of Section 14 declares that "no right to compensation shall accrue to such owners from and after the date of relinquishment for the property so relinquished." Petitioner argues that the relinquishment of a railroad by the President pursuant to Section 14 did not remove such road from

Federal control because Section 1 of the same Act provided that:

> every railroad engaged in general transportation which theretofore competed for traffic, or connected with a railroad of which the President had taken possession, shall be held and considered as within "federal control" as herein defined, and necessary for the prosecution of the War, and shall be entitled to the benefit of all the provisions *of this Act.* (Italics ours.)

But the apparent conflict between the two provisions does not aid petitioner's claim, for the benefits of the Federal Control Act are to be found in its provisions, and, so far as compensation is concerned, such benefits are limited to "just compensation" during the time the road was actually under Federal control; whereas, petitioner's claim here is for a payment under the Transportation Act, 1920, after control of its road was relinquished.

The suggestion (Br. 35–39) that because in Section 209 Congress guaranteed to all carriers, regardless of whether they were under Federal control or operated privately during the control period, a minimum income equivalent to their returns during the test period, it must also have intended by section 204 to pay all carriers which suffered a diminished income in the control period as compared with the test period irrespective of whether they sustained an actual loss during the control period, as a whole and alone, is not persuasive be-

cause it overlooks the obvious difference between the two sections. In Section 240, Congress provided for "partial redress" for "consequential losses" resulting to carriers privately operated during the period of Federal control, *Continental Tie & L. Co.* v. *United States, supra.* That period ended with the enactment of Section 204, and the results of such past operations were already fairly known, or could be closely estimated. Reimbursements under that section were outright contributions from the Government, based not upon vested rights but upon moral and equitable considerations, and nothing was asked or exacted by the Government in exchange for such payments. Under that section the Government could collect nothing from any carrier. But, in the enactment of Section 209, Congress was looking to the future and to the interest, not only of the carriers but the general public as well, in the stabilization of the financial condition and prospects of carriers generally constituting the nation's transportation system as a whole. In consideration of the guaranty provided by that section, Congress, in paragraph (d) thereof, exacted from the carriers any railway operating income realized by them in excess of the minimum guaranteed, and provided that such excess should be paid forthwith into the Treasury of the United States. Moreover, the guaranty benefits of that section were not available to any carrier which did not on or before March 15, 1920, file its written acceptance thereof, which implied an undertaking

to continue operating its line for the public benefit and convenience, as well as its own, during the entire guaranty period, *Texas & Pacific Ry. Co.* v. *United States,* 286 U.S. 285. There was no such exchange or trading of benefits, either public or private, or implied undertaking in the enactment of Section 204.

We perceive nothing in the legislative history of Section 204, or other provisions of the Transportation Act, to compel the conclusion that by that section Congress intended to compensate all carriers which were privately operated during the Federal control period, regardless of whether such operation was at a deficit or a profit. Certainly the legislative history is insufficient to justify attributing to the term "deficit in its railway operating income" a meaning which so far departs from the sense in which it is customarily used and universally accepted as to give it almost the opposite of its accepted meaning.

II

THE COURTS WERE NOT BOUND BY THE COMMISSION'S INTERPRETATION; THEY HAD JURISDICTION TO CONSTRUE THE STATUTE AND DETERMINE WHETHER THE PAYMENT TO PETITIONER WAS WITHIN THE COMMISSION'S AUTHORITY

It is contended (Br. 44–71) that even though the Commission misconstrued the statute in certifying payment to petitioner, its first action is final and conclusive upon both the Commission and the courts; that the Commission had no power to reconsider and reverse its first decision; and that the

courts were without jurisdiction to determine whether the statute included carriers having a mere diminished income as well as those which had an actual loss.

Petitioner would thus absolutely preclude the Government from recovering any payment under section 204, regardless of whether the recipient was within the class defined by the section or whether the Commission was authorized to certify the payment. The contention ignores a long line of familiar decisions of this Court sustaining the right of the Government to recover money disbursed by its agents upon their misconstruction of the law under which they assumed to act. *Wisconsin Central Railroad Co.* v. *United States,* 164 U.S. 190, 210; *Grand Trunk Western Ry. Co.* v. *United States,* 252 U.S. 112; *United States* v. *Burchard,* 125 U.S. 176; *Burnet* v. *Porter,* 283 U.S. 230. These decisions foreclose all questions with respect to the right of the Government to recover a payment resulting from an erroneous conclusion by its agent as to the legal effect of the particular statute under, or in reference to which, he is proceeding; and, upon authority of them, the Circuit Court of Appeals correctly held (R. 92):

> The United States may demand repayment of money paid out by its officers or agents where no authority of law exists for such payment. Persons so receiving public funds are charged with knowledge that they have taken that to which they have not the

right, and are bound, upon demand, to return it.

Manifestly, the power to construe the statute and determine whether it authorized the payment to petitioner was either in the courts or in the Commission. We, think, and will presently demonstrate, that the court clearly had jurisdiction, and that the question whether the Commission had power to reverse its first decision need not be decided. But, if we should be wrong in that view, then we contend that the Commission was empowered to reconsider and correct its first decision; and that if, as petitioner argues, the Commission had exclusive power to construe the statute, the courts must be bound by its final decision.[3] For,

[3] The Commission has consistently exercised the power to reopen and correct its decisions with respect to claims under sections 204 and 209. See *Deficit Status of Boyne City, Gaylord, and Alpena*, 76 I.C.C. 731, and 79 I.C.C. 749; *Deficit Settlement With B. A. & P. Ry.*, 117 I.C.C. 780; *Guaranty Settlement With Ray & Gila Valley R. R. Co.*, 76 I.C.C. 557, and 138 I.C.C. 59; *Guaranty Settlement With B. R. & P. Ry.*, 71 I.C.C. 21, and 71 I.C.C. 262; *Guaranty Settlement With Great Northern Ry. Co.*, 99 I.C.C. 231, and 111 I.C.C. 318; *Guaranty Settlement With Northern Pacific Ry. Co.*, 99 I.C.C. 247, and 111 I.C.C. 340. The power thus exercised is apparently within the Commission's discretion, *Empire & S. E. Ry Co.* v. *Interstate Commerce Commission*, 45 F. (2d) 293 (App. D. C.). And the existence of it is not inconsistent with this Court's decision in *United States* v. *Great Northern Ry. Co.*, 287 U.S. 144, holding that certificates issued by the Commission for "partial payments" under the emergency provisions of section 212 were final, because the legislative history of that section showed emphatically that Congress so intended.

if the Commission's jurisdiction was exhausted by its first and unauthorized action, and if that action also was conclusive upon the courts, then the Government is left in the anomalous position of possessing the right, sustained by this Court in the decisions last cited, to recover an unauthorized payment but with an absolute denial of its right to recover for lack of a forum.

But we think the courts below were clearly correct in holding that they had jurisdiction to construe the statute and determine whether the payment was authorized. On this point the Circuit Court of Appeals held (R. 91–92):

> It has been clearly settled that the Courts have full right, when appealed to, to determine by independent hearing, whether agencies of the government to which have been committed duties involving the exercise of administrative functions, or powers of a judicial nature, have exercised their powers with respect to the particular persons or subject matter designated by Congress. If the power is lacking the act is void.

The determination of facts with respect to claims of carriers within the purview of section 204 was the Commission's "ministerial" function. *Continental Tie & L. Co.* v. *United States, supra,* p. 295. But the question whether a particular carrier was within the purview of the section is purely judicial, for that question is fundamental or "jurisdictional." The distinction between ministerial or administrative functions and those which are

purely judicial is clearly defined and explained by this Court in *Crowell* v. *Benson,* 285 U.S. 22, p. 54 *et seq.,* wherein it was held that whether a person claiming compensation under the Longshoremen's and Harbor Workers' Compensation Act was "employed" as that term was used in the Act, was a judicial question, which was within the power and province of the Court to determine. In that case the Court upheld its power to determine the *fact* of employment because the existence of that fact was "indispensable to the application of the statute", while here it is called upon merely to construe the term "deficit", and not to determine any fact, for the correctness of the Commission's finding that petitioner operated its line at a profit during Federal control is admitted. The case at bar does not fall within the class of cases which the opinion in that case distinguished (pp. 57–58) from the decision therein, for in this case the Commission was not exercising its power as an agency of Congress to regulate commerce. *Great Northern Ry. Co.* v. *United States,* 277 U.S. 172, 180.

Section 204 is silent with respect to finality or court review of the Commission's action. The decision of the Circuit Court of Appeals, therefore, is not in conflict with this Court's decision in *Work* v. *Rives,* 267 U.S. 175, or other decisions construing the Dent Act prior to amendment, because that Act then expressly declared that the decision of the Secretary of the Interior was "conclusive and final." The subsequent amendment of the Act,

authorizing court review of final decisions of the Secretary upon questions of law, does not render applicable the decision of this Court, after the amendment, in *Wilbur* v. *United States,* 284 U.S. 231, for then the right of the Court to review questions of law was expressly conferred. Nor is there conflict between the decision below and the decision in *Great Northern Ry. Co.* v. *United States,* 277 U.S. 172. There this Court held that the special remedy provided by Urgent Deficiencies Act, 38 Stat. 219 (U.S.C. Title 28, sec. 41 (28); secs. 43–47, inclusive) for judicial review of orders issued by the Commission in the exercise of its statutory power to regulate commerce, was not available in a suit attempting to enjoin and annul a certificate issued by it under sec. 209, Transportation Act, 1920. And there is no conflict with the decision in *United States* v. *Great Northern Ry.,* 287 U.S. 144, cited by petitioner, where this Court laid down three grounds differentiating that situation from the case at bar: First, this Court said, "mistake there was none but merely a revision of judgment in respect of matters of opinion", whereas in the case at bar there was a mistake in interpretation of the statute. Secondly, the Court pointed out that "the officials of the Government knew precisely what they were doing, and kept well within the statute defining their authority. They did not act illegally * * *." In the case at bar the very point is whether the Commission in authorizing the payment, here sought to be recovered, was acting in

excess of its authority. Third, in that case the Commission contended that it could revise its discretion and recall payments made, whereas in this case the Commission is not changing its judgment within the field of discretion but has simply come to realize that it had no authority to authorize the payment at all.

The decision of this Court in *United States* v. *Ferreira,* 13 How. 39, cited Br. 50, 57, lends no support to petitioner's argument that the Commission's first action is final. That was an attempt to "appeal" to a court from an "award" rendered by a judge acting under a statute which expressly constituted him a special tribunal for the purpose merely of making awards upon claims, and this Court held that no "appellate" review of the award could be had. Nor does the decision in *United States* v. *Arredondo,* 6 Pet. 691, support the argument with respect to conclusiveness or finality of the Commission's action as presented in the case at bar. On the contrary, the decision clearly supports the Government's contention, for the language upon which petitioner relies (Br. 60) expressly states that only questions concerning "power in the officer and fraud in the party" can be raised in the courts upon a determination by a specially designated public officer or tribunal. The fundamental question in the case at bar is whether there was "power" in the Commission to certify a payment to the petitioner. If the statute is to be construed as the Government contends, then the Com-

mission was without such power. The decision in *United States* v. *Wildcat*, 244 U.S. 111, is inapposite, for the question here is not whether the Commission made a mistake with respect to a matter within the purview of its authority, but whether the statute authorized any payment to the class of carrier which petitioner admittedly was. The cases cited at pp. 65 and 66 of petitioner's brief do not touch the question of finality or conclusiveness presented in this case. They hold merely that neither mandamus nor certiorari will lie to correct decisions by the Commission upon claims within the purview of its authority under sections 204 and 209.

Nor is there merit in the suggestion (Br. 69) that the Commission's first action must be regarded as final and conclusive upon the courts merely because two of its members who participated in that decision had been superseded by two members when its second decision was rendered. The suggestion misconceives the fact that the authority was delegated to "the Commission" as a tribunal composed of several members and not to the several members as individuals.

III

RECOVERY MAY NOT BE DENIED ON THE GROUND (1) THAT PETITIONER IS ENTITLED TO RETAIN THE MONEY EX AEQUO ET BONO, OR (2) THAT THE PAYMENT WAS A COMPROMISE

It is asserted (Br. 69) that because petitioner accepted the payment in good faith and has since

changed its *status*, the money *ex aequo et bono* belongs to it, and not to the Government. The claim is clearly erroneous, for the principle is unavailing to one who seeks to escape the refunding of an unauthorized payment of public funds. If petitioner has any right to the money it must be spelled out of the statute itself. *Continental Tie & L. Co.* v. *United States, supra,* p. 295. If the statute gave it no right, then it has none, for the Commission's misconstruction could not confer what the statute did not grant, and the petitioner is liable under the principle announced in *Wisconsin Central Railroad Co.* v. *United States, supra,* 164 U.S., at p. 212, that:

> * * * parties receiving moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them.

The suggestion (Br. 80–87) that the payment was a "compromise" of petitioner's claim, and cannot, therefore, be set aside by this suit, is based upon a misconception of the authority delegated to the Commission. The basis of the suggestion apparently is the fact that at the Commission's request petitioner signed a statement that it accepted the payment "in settlement of all claims against the Government under said section 204" (R. 21–23). The Circuit Court of Appeals declined to consider the payment as a compromise because it had already concluded that petitioner was not a "carrier" as defined in the section, and, therefore, "was not entitled to any amount under the facts as ad-

mitted." (R. 92.) But it is clear that the payment may not be treated as a compromise, for section 204 simply directs the Commission to ascertain, in the manner therein prescribed, the amount payable to the several carriers entitled to reimbursement, and confers no authority to "trade" or "compromise" with carriers. Nor does the fact that petitioner signed a statement, at the Commission's suggestion, that it accepted the payment in settlement of all claims under section 204, enlarge the authority conferred, for the Commission could not legislate.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

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Assistant Attorney General.

ELMER B. COLLINS,
Special Assistant to the Attorney General.

OCTOBER 1933.

APPENDIX

TRANSPORTATION ACT, 1920, C. 91, 41 STAT. 456, 460, U.S.C., TITLE 49, SEC. 73, AS AMENDED MARCH 4, 1927, C. 510, 44 STAT. 1446, U.S.C., SUP. VI, TITLE 49, SEC. 22

REIMBURSEMENT OF DEFICITS DURING FEDERAL CONTROL

SEC. 204. (a) When used in this section—

The term "carrier" means a carrier by railroad which, during any part of the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation; but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; and

The term "test period" means the three years ending June 30, 1917.

(b) For the purposes of this section—

Railway operating income or any deficit therein for the period of Federal control shall be computed in a manner similar to that provided in section 209 with respect to such income or deficit for the guaranty period; and

Railway operating income or any deficit therein for the test period shall be computed in the manner provided in section 1 of the Federal Control Act.

(c) As soon as practicable after March 1, 1920, the Commission shall ascertain for every carrier, for every month of the period of Federal control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if any (hereinafter called "Federal control return"), and the average of its deficit in railway operating income, if any, and of its railway operating income, if any, for the three corresponding months of the test period taken together (hereinafter called the "test period return"): *Provided,* That "test period return," in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during the test period taken together, during which the carrier operated its railroad or system of transportation.

(d) For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the Commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, or (2) the difference between its test period return, if an income, and its Federal control return, if a smaller income, or (3) the sum of its Federal control return, if a deficit, plus its test period return, if an income. The sum of such amounts shall be credited to the carrier.

(e) For every such month the Commission shall then ascertain (1) the difference between the carrier's Federal control return, if an income, and its test period return, if a smaller income, or (2) the difference between its test period return, if a deficit, and its Federal control return, if a smaller deficit, or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit. The sum of such amounts shall be credited to the United States.

(f) If the sum of the amounts so credited to the carrier under subdivision (d) exceeds the sum of the amounts so credited to the United States under subdivision (e), the difference shall be payable to the carrier. In the case of a carrier which operated its railroad or system of transportation for less than a year during, or for none of, the test period, the foregoing computation shall not be used, but there shall be payable to such carrier its deficit in railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation.

(g) The Commission shall promptly certify to the Secretary of the Treasury the several amounts payable to carriers under paragraph (f). The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) This section shall not be applicable to any carrier which has not, on or before the expiration of sixty days after this subdivision takes effect, filed with the commission a statement, compiled substantially in the manner prescribed in this section, showing the amount claimed to be due such carrier under this section.

* * * * *

GUARANTY TO CARRIERS AFTER TERMINATION OF FEDERAL CONTROL

SEC. 209. (a) When used in this section—

The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;

The term "guaranty period" means the six months beginning March 1, 1920.

The term "test period" means the three years ending June 30, 1917; and

The term "railway operating income" and other references to accounts of carriers by railroad shall, in the case of a sleeping-car company, be construed as indicating the appropriate corresponding ac-

counts in the accounting system prescribed by the Commission.

(b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.

(c) The United States hereby guarantees—

(1) With respect to any carrier with which a contract (exclusive of so-called "cooperative contracts" or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as 6 months bears to the number of months during which such carrier was under Federal operation, including in both cases the increases in such compensation provided for in section 4 of the Federal Control Act;

(2) With respect to any carrier entitled to just compensation under the Federal Control Act, with which such a contract has not been made, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one half of the annual amount estimated by the President as just compensation for such carrier under the Federal Control Act, including the increases in such compensation provided for in section 4 of the Federal Control Act. If any such

carrier does not accept the President's estimate respecting its just compensation, and if in proceedings under section 3 of the Federal Control Act it is determined that a larger or smaller annual amount is due as just compensation, the guaranty under this paragraph shall be increased or decreased accordingly;

(3) With respect to any carrier, whether or not entitled to just compensation under the Federal Control Act, with which such a contract has not been made, and for which no estimate of just compensation is made by the President, and which for the test period as a whole sustained a deficit in railway operation income, the guaranty shall be a sum equal to (a) the amount by which any deficit in its railway operating income for the guaranty period as a whole exceeds one half of its average annual deficit in railway operating income for the test period, plus (b) an amount equal to one half the annual sum fixed by the President under section 4 of the Federal Control Act;

(4) With respect to any carrier not entitled to just compensation under the Federal Control Act, which for the test period as a whole had an average annual railway operating income, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the average annual railway operating income of such carrier during the test period.

(d) If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (1), (2), or (4) of subdivision (c) is in excess of the minimum railway operating income guaranteed in such paragraph, such carrier shall forthwith pay the amount

of such excess into the Treasury of the United States. If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (3) of subdivision (c) is in excess of one-half of the annual sum fixed by the President with respect to such carrier under section 4 of the Federal Control Act, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. The amounts so paid into the Treasury of the United States shall be added to the funds made available under section 202 for the purposes indicated in such section. Notwithstanding the provisions of this subdivision, any carrier may retain out of any such excess any amount necessary to enable it to pay its fixed charges accruing during the guaranty period.

(e) For the purposes of this section railway operating income, or any deficit therein, for the test period shall be computed in the manner provided for in section 1 of the Federal Control Act.

(f) In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section—

(1) Debits and credits arising from the accounts, called in the monthly reports to the Commission, equipment rents and joint facility rents, shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are not under Federal control at the time of termination thereof, shall be excluded;

(2) Proper adjustments shall be made (a) in case any lines which were, during any portion of the period of Federal control, a part of the railroad or system of transportation of the carrier, and

whose railway operating income was included in such income of the carrier for the test period, do not continue to be a part of such railroad or system of transportation during the entire guaranty period, and (b) in case of any lines acquired by, leased to, or consolidated with, the railroad or system of transportation of the carrier at any time since the end of the test period and prior to the expiration of the guaranty period, for which separate operating returns to the Commission are not made in respect to the entire portion of the guaranty period;

(3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in paragraph (a) of section 5 of the "standard contract" between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed);

(4) There shall not be included any taxes paid under Title I or II of the Revenue Act of 1917, or such portion of the taxes paid under Title II or III of the Revenue Act of 1918 as by the terms of such Act are to be treated as levied by an Act in amendment of Title I or II of the Revenue Act of 1917; and

(5) The Commission shall require the elimination and restatement of the operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct

and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States

any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

(i) If the American Railway Express Company shall, on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this subdivision, the contract of June 26, 1918, between such company and the Director General of Railroads, as amended and continued by agreement dated November 21, 1918, shall remain in full force and effect during the guaranty period in so far as the same constitutes a guaranty on the part of the United States to such company against a deficit in operating income.

In computing operating income, and any deficit therein, for the guaranty period for the purposes of this subdivision, the Commission shall require the elimination and restatement of the operating expenses and revenues for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period, and to exclude from operating expenses so much of the charge for payment for express privileges to carriers on whose lines the express traffic is carried as is in excess of 50.25 per centum of gross express revenue.

* * * * *

SEC. 212. [*Added February 26, 1921,* v. 72, 41 Stat. 1145.] (a) In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) if for a payment in respect to the guaranty to a carrier other than the American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which cannot at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts

payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement.

Federal Control Act, as Amended

Section 1 and Section 14 of the Federal Control Act, as amended, c. 25, 40 Stat. 451, provide that:

> Sec. 1. That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.
>
> That any railway operating income accruing during the period of Federal control in excess of such just compensation shall remain the property of the United States. In the computation of such income, debits and credits arising from the accounts called in the monthly reports to the Interstate Commerce Commission equipment rents and joint-facility rents shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interur-

bans, as are at the time of the agreement not under Federal control, shall be excluded. If any lines were acquired by, leased to, or consolidated with such railroad or system between July first, nineteen hundred and fourteen, and December thirty-first, nineteen hundred and seventeen, both inclusive, and separate operating returns to the Interstate Commerce Commission were not made for such lines after such acquisition, lease, or consolidation, there shall (before the average is computed) be added to the total railway operating income of such railroad or system for the three years ended June thirtieth, nineteen hundred and seventeen, the total railway operating income of the lines so acquired, leased, or consolidated, for the period beginning July first, nineteen hundred and fourteen, and ending on the date of such acquisition, lease, or consolidation, or on December thirty-first, nineteen hundred and seventeen, whichever is the earlier. The average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.

Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation;

that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation.

Every such agreement shall also contain adequate and appropriate provisions for the maintenance, repair, renewals, and depreciation of the property, for the creation of any reserves or reserve funds found necessary in connection therewith, and for such accounting and adjustments of charges and payments, both during and at the end of Federal control as may be requisite in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control, and also that the United States may, by deductions from the just compensations or by other proper means and charges, be reimbursed for the cost of any additions, repairs, renewals, and betterments to such property

not justly chargeable to the United States; in making such accounting and adjustments, due consideration shall be given to the amounts expended or reserved by each carrier for maintenance, repairs, renewals, and depreciation during the three years ended June thirtieth, nineteen hundred and seventeen, to the condition of the property at the beginning and at the end of Federal control and to any other pertinent facts and circumstances.

The President is further authorized in such agreement to make all other reasonable provisions, not inconsistent with the provisions of this Act or of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes", approved August twenty-ninth, nineteen hundred and sixteen, that he may deem necessary or proper for such Federal control or for the determination of the mutual rights and obligations of the parties to the agreement arising from or out of such Federal control.

If the President shall find that the condition of any carrier was during all or a substantial portion of the period of three years ended June thirtieth, nineteen hundred and seventeen, because of nonoperation, receivership, or where recent expenditures for additions or improvements or equipment were not fully reflected in the operating railway income of said three years or a substantial portion thereof, or because of any undeveloped or abnormal conditions, so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount

as just compensation as under the circumstances of the particular case he shall find just.

That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: *Provided, however,* That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both.

The agreement shall also provide that the carrier shall accept all the terms and conditions of this Act and any regulation or order made by or through the President under authority of this Act or of that portion of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation.

* * * * *

SEC. 14. That the Federal control of railroads and transportation systems herein and heretofore provided for shall continue for

and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of rationfications of the treaty of peace: *Provided, however,* That the President may, prior to July first, nineteen hundred and eighteen, relinquish control of all or any part of any railroad or system of transportation, further Federal control of which the President shall deem not needful or desirable; and the President may at any time during the period of Federal control agree with the owners thereof to relinquish all or any part of any railroad or system of transportation. The President may relinquish all railroads and systems of transportation under Federal control at any time he shall deem such action needful or desirable. No right to compensation shall accrue to such owners from and after the date of relinquishment for the property so relinquished.

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

No. 8.—October Term, 1933.

Butte, Anaconda & Pacific Railway Co., Petitioners, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 20, 1933.]

Mr. Justice Brandeis delivered the opinion of the Court.

This action was brought by the United States, on August 23, 1929, in the federal court for Montana to recover the sum of $487,116.31 paid to Butte, Anaconda & Pacific Railway Company on March 26, 1925. The payment was made pursuant to a certificate of the Interstate Commerce Commission for that amount, issued March 20, 1925, and addressed to the Secretary of the Treasury. *Deficit Settlement with Butte, Anaconda & Pacific Ry.*, 94 I. C. C. 617. The Secretary, after receiving from the Comptroller-General his certificate approving the payment, issued a warrant for that sum and transmitted it to the Treasurer of the United States. The Treasurer paid the Railway.

The proceeding before the Commission originated in a claim for $600,527.35 filed with it by the Railway under § 204 of Transportation Act, 1920, 41 Stat. 460, entitled "Reimbursement of Deficits during Federal Control."[1] Upon due hearing, the Commission concluded that the Railway was entitled to $487,116.31; and it offered to issue a certificate for that amount on condition that the Railway sign a release accepting the amount "in settlement of all claims against the Government under said section 204." This condition was agreed to. About two years after the money received had been disbursed by the Railway, partly in dividends

[1]The term Federal control means, in this connection, the period from December 28, 1917 to March 1, 1920, during which the possession, use, control and operation of railroads and systems of transportation were taken over or assumed by the President. Proclamation of December 26, 1917; 40 Stat. 1733.

to stockholders, partly in the expenses of operation, the Commission issued an order purporting to reopen the proceeding; and set a hearing "for the purpose of affording the Railway opportunity to show cause why the certificate issued on March 20, 1925, should not be revoked and its claim dismissed." The Railway, appearing specially, protested against the action of the Commission in attempting to reopen the proceeding; and challenged its power to do so. On March 7, 1927, the Commission entered an order purporting to cancel the certificate of March 20, 1925, and to dismiss the Railway's claim. *Deficit Settlement with Butte, Anaconda & Pacific Railway*, 117 I. C. C. 780. On June 8, 1928, the Under-Secretary of the Treasury demanded of the Railway repayment of the $487,116.31 received by it. Repayment was refused. Fourteen months later, this action was begun to recover the money.

The case was first heard upon defendant's demurrer to the complaint. That demurrer was overruled. The defendant set up by answer the terms on which the payment had been made and the disposition of the money received. Then the case was heard upon the plaintiff's demurrer to the answer; that demurrer was sustained; and judgment for the Government was entered in the sum of $487,116.31 with interest at 8 per cent from the date of the demand and costs. The Circuit Court of Appeals affirmed the judgment. 61 F. (2d) 587. This Court granted certiorari, 289 U. S. 717.

The action is brought to recover money paid by mistake. The charge is that the money was paid, because, in 1925, the officials misconstrued the word "deficit", so as improperly to extend the scope of § 204. That is a charge, not of mistake but of error of judgment—a judgment necessarily exercised in the performance of the duties of office. Neither the Commission in issuing the certificate, nor the Secretary of the Treasury, the Comptroller-General or the Treasurer when co-operating to make the payment, labored under any mistake of fact; or overlooked any applicable rule of law; or was guilty of any irregularity in proceeding. Moreover, if the word "deficit" was misconstrued, the error was not due to inadvertence. Ever since the enactment of Transportation Act, 1920, it had been recognized that the construction to be given the word "deficit" presented a difficult and important question. In 1920, before hearing those interested, the Commission attributed to the word the meaning now contended

for by the Government. Protests against its then interpretation led the Commission to set, in 1921, a public hearing for the consideration solely of that question.[2] Counsel for many railroads participated and submitted briefs. On February 7, 1922, the Commission stated its conclusion in an elaborate report. *In the matter of the construction of the word "deficit" as used in Paragraph (a) of Section 204 of the Transportation Act, 1920,* 66 I. C. C. 765. The rule there announced was consistently acted upon for over two years and a half. Under it, the Commission issued certificates to 71 carriers, including that here attacked.[3] Then there was a change in the membership of the Commission. On October 17, 1925, it overruled, in *Deficit Status of Bingham & Garfield Railway Co.*, 99 I. C. C. 724, its earlier decision; and in March, 1927, instituted against Butte, Anaconda & Pacific Railway Company the proceeding to revoke the certificate on which payment had already been made.[4] Obviously, "Mistake . . . there was none, but merely a revision of judgment in respect of matters of opinion." *United States* v. *Great Northern Railway,* 287 U. S. 144, 151.

The United States claims that the money can be recovered because it was a disbursement made without the authority of Congress. The argument is that the Commission had no authority to issue a certificate, and the financial officers of the Government had no authority to pay money, except to a carrier which had suffered a "deficit" in operations during the period of Federal control; that, properly construing that word, the Railway had not suffered a "deficit"; and that, having received the money which the officials were not authorized to pay, the Railway must restore it, since in dealings with the Government one is bound, at his peril, to know the limits of the authority of its agents. We have no occasion to determine which of the Commission's interpretations of the word "deficit" is the correct one. For we are of opinion that the Government cannot recover the money paid in 1925, even if the Commission erred in attributing to the word "deficit" the meaning then acted on.

The decision was on the merits. The case is no different than it would have been, if the Commission had erred in any other ruling

[2]See Annual Report of Interstate Commerce Commission for 1921, pp. 21-22; for 1922, p. 34.

[3]Annual Report of Interstate Commerce Commission for 1928, pp. 13-14.

[4]Annual Report of Interstate Commerce Commission for 1925, pp. 24-25.

on a matter of law; or in a finding strictly of fact; or in some finding as to maintenance, depreciation or value—determinations called findings of fact but which rest largely in opinion. In making those decisions the Commission would necessarily act in a *quasi*-judicial capacity. If it misconstrued the term "deficit", it committed an error; but it did not transcend its jurisdiction. Since Congress has not provided a method of review, neither the Commission nor a court has power to correct the alleged error after payment made pursuant to a certificate. The Government cannot recover, because when Congress, by § 204, imposed the duty to certify to the Treasury the amounts severally due to carriers, it required the Commission—and hence authorized it—to determine whether the claimant was entitled to relief.

In making its determinations the Commission was required to decide many things besides the meaning of the term "deficit" or the amount thereof, if any. To appreciate the broad scope of the Commission's duty, we must consider the occasion and the character of the legislation and the precise question of construction here involved. On December 28, 1917, the President took possession and assumed control of all the railroads in the United States. By the Federal Control Act, March 21, 1918, 40 Stat. 451, Congress provided for compensation equal to the "average annual railway operating income for the three years ended" June 30, 1917, called the "test period".[5] Later, the Director-General surrendered the possession and control of many short-lines. Their owners operated them thereafter privately during some part of the period of Federal control. These owners claimed that such private operation had resulted in heavy losses attributable to the continued Federal control of the main transportation systems of the country. They urged upon Congress that the surrendered short-lines ought to be put into as good a position financially as they would have been in, if the Director General had retained possession of them throughout the period of

[5] By the Federal Control Act, March 21, 1918, 40 Stat. 451, Congress authorized the President to agree with the several carriers that compensation for the period of Federal control shall be paid at a rate equal to their annual railway operating income for the three years ended June 30, 1917—called the "test period." Section 204 provided for determining similarly the amount of the deficit [or losses] payable by reference to such "test period."

Federal control. Recognizing that they had suffered, Congress included in Transportation Act, 1920, the provision for compensation contained in § 204. Paragraph (a) describes the carriers entitled to compensation:

"The term 'carrier' means a carrier by railroad which, during the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation; but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;"

Paragraphs (c), (d) and (e) direct the Commission to ascertain the data from which the amount of deficits or losses are to be calculated; paragraph (f) fixes the amounts payable; and paragraph (g) provides:

"The Commission shall promptly certify to the Secretary of the Treasury the several amounts payable to carriers under paragraph (f). The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated."

Claims under § 204 were filed by 461 carriers.[6] Each claimant insisted that it had suffered a "deficit". The controverted question of construction discussed in this case is whether, by the use of the word "deficit", Congress intended that compensation should be paid to those carriers only which had suffered an actual [red-ink] loss in operation or intended to put all the short-lines into as good a position as they would have been in if the Director General had retained possession throughout Federal control. If "deficit" be held to mean actual loss in operation, many of these carriers would receive nothing, as they had earned net income, although at a rate less than during the "test period." But it might prove upon investigation of the accounts that some carriers who had vainly claimed compensation on the basis of lessened income as compared with the "test period" were entitled to compensation

[6]Annual Report of Interstate Commerce Commission for 1929, p. 11.

because they had actually suffered a [red-ink] loss in operation. Compare *Deficit Status of Fairport, Painesville and Eastern R. R. Co.*, 124 I. C. C. 323, 145 I. C. C. 684. This is true, because, while on the face of the accounts there appeared to have been net income, it might prove that there was, during the period, an operating loss, by reason of the fact that the carrier had failed to make the proper maintenance and depreciation charges. Where the right to compensation depends upon the propriety of the maintenance and depreciation charges, it may be impossible to determine, until the completion of the investigation into the accounts, whether the carrier is entitled to relief. Compare *Great Northern Ry.* v. *United States*, 277 U. S. 172; *Continental Tie and Lumber Co.* v. *United States*, 286 U. S. 290; *Great Northern Ry.* v. *United States*, 287 U. S. 144.

On the other hand, many a carrier may be denied compensation although the fact is unquestioned that a [red-ink] operating loss had been suffered. Such denial has been based sometimes on failure to prove other essential facts; sometimes because of a ruling on matter of law. The Commission has been required, in passing upon claims under § 204, to decide, in addition to the meaning of the word "deficit", many controlling questions of statutory construction which, in a sense, are preliminary. Among them are: What did Congress mean by the phrase "in general transportation"?[7] What did Congress mean by the phrase "compete for traffic . . . . with a railroad under Federal control"?[8]

[7]In Deficit Claim of Manitou & Pike's Peak Ry., 79 I. C. C. 1; 94 I. C. C. 767; Deficit Status of Glenfield & Western R. R. Co., 150 I. C. C. 39; and in Deficit Status of Massillon Belt Ry. Co., 154 I. C. C. 1, it was held the term had a broader significance than "common carrier"; that it meant a carrier which might be utilized by the Government in the prosecution of the War; that, by this term, Congress intended to differentiate between railroads [common carriers] with reference to their utility and necessity as a part of the transportation system of the country; and that freight transportation, rather than passenger transportation was considered a test of this utility and necessity. The claims were dismissed because these carriers did not meet the test erected.

[8]In Deficit Claim of Manitou & Pike's Peak Ry., 94 I. C. C. 767, 773, the claim was dismissed, among other reasons, because it was not shown that the competition was of such a character that the short-line suffered, through diversion, loss of traffic that otherwise might have moved over its line.

What did Congress mean by the phrase "connected with a railroad under Federal control"?[9] What did Congress mean by the phrase "common carrier"?[10] What did Congress mean by "a system of transportation"?[11] Did Congress intend to grant compensation to a carrier part of whose line is in a foreign country?[12] Did Congress intend that compensation should be granted to carriers which had failed either during the period of Federal control or during the "test period" to render reports to the Commission and to keep their accounts in conformity with its rules?[13] Did Congress intend that a certificate should issue where the operating loss was due to expenditures arising from occurrences unusual in

[9]In Deficit Claim of Manitou & Pike's Peak Ry., 94 I. C. C. 767, 773, it was held, also, that although the carrier joined in through passenger rates with railroads under Federal control, it was not within this phrase, because there was not such a connection as would permit the regular and general transfer of freight. Compare In Matter of Final Settlement with the Nevada-California-Oregon Ry., under § 204 of the Transportation Act, 1920, 71 I. C. C. 548; Deficit Settlement with Nevada County Narrow Gauge R. R., 90 I. C. C. 75, where it was held that there may be a connection between a broad gauge and a standard gauge railroad within the meaning of paragraph (a).

[10]Compensation was denied as not having been so operated, In the Matter of the Application of the Allegheny & South Side Railway Co., etc., 71 I. C. C. 90; Deficit Status of Northern Liberties Ry., 72 I. C. C. 265; Deficit Status of Scottdale Connecting R. R., 124 I. C. C. 101; Deficit Status of Calumet, Hammond & South Eastern R. R. Co., 154 I. C. C. 229; Deficit Status of Gideon & North Island R. R. Co., 158 I. C. C. 329; Deficit Status of Mississippi & Western R. R., 175 I. C. C. 486, 489; Deficit Status of Elk & Little Kanawha R. R. Co., 180 I. C. C. 10.

[11]Deficit Settlement with Cripple Creek & Colorado Springs R. R. Co., 82 I. C. C. 129; 90 I. C. C. 271.

[12]In Deficit Status of United States & Canada R.R.-Grand Trunk, Lessee, 76 I. C. C. 455, it was held that although this carrier made separate returns to the Commission which showed a deficit, compensation was not recoverable, the part of the system in the United States being but a small portion of that of the controlling Canadian corporation. Compare Deficit Status of Duluth, Winnipeg & Pacific Ry. Co., 76 I. C. C. 689—a part of the Canadian Northern System.

[13]The Commission held that Congress could not have intended to grant compensation in such cases, although § 204 did not in terms exclude carriers in intrastate commerce. Deficit Status of Empire & Southeastern Ry. Co., 117 I. C. C. 609. Many claims were dismissed on this ground. See, e. g., Deficit Status of Rural Valley R. R., 131 I. C. C. 509; Deficit Status of Dexter & Northern R. R., 138 I. C. C. 25; Deficit Status of Kentucky, Rockcastle & Cumberland R. R., 138 I. C. C. 27; Deficit Status of Eureka Hill Ry., 138 I. C. C. 29; Deficit Status of Pine Bluff & Northern Ry., 145 I. C. C. 251; Deficit Status of Massillon Belt Ry. Co., 154 I. C. C. 1.

the conduct of the carrier's business?[14] Did Congress intend that a certificate should issue where the operating loss was due to causes other than the War or the Federal control of the main lines of transportation?[15] Did Congress intend that a railroad technically under Federal control, but which actually was operated by its owners, should receive compensation under § 204?[16]

While § 204 granted a bounty, it conferred a right, and constituted the Commission a *quasi*-judicial tribunal to adjudicate claims thereunder. Thus it was called upon to pronounce a formal judgment on rights asserted. A decision adverse to the carrier on any one of the suggested questions of construction might compel dismissal of the claim;[17] thus relieving the Commission of the necessity of enquiring whether a deficit had been suffered. But it does not follow that such a decision would determine an issue of jurisdiction. Under this legislation, whether a claimant seeking "relief has the requisite standing is a question going to the merits and its determination is an exercise of jurisdiction." Compare *General Investment Co.* v. *New York Central R. R.*, 271 U. S. 228, 230. Though it were charged that the Commission erred in so dismissing the claim, the carrier could not by mandamus compel it to proceed with the enquiry. See *Abilene & Southern Ry. Co.* v. *Interstate Commerce Commission* 8 F. (2d) 901; *Cripple Creek & Colorado Springs R. R. Co.* v. *Interstate Commerce Commission*, 11 F. (2d) 554; *Empire & S. E. Ry. Co.* v. *Interstate Commerce Commission*, 45 F. (2d) 292; *Arcata & Mad River R. R. Co.* v. *Interstate Commerce Commission*, — F. (2d) —. Compare *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638.

[14] Deficit Status of West Virginia Northern R. R. Co., 82 I. C. C. 491.

[15] See Deficit Status of Calumet, Hammond & Southeastern Ry., 154 I. C. C. 289; New York & Pennsylvania Ry. Co. Deficit Claim, 162 I. C. C. 796; Arcata & Mad River R. R. Co., Deficit Status, 162 I. C. C. 641; Crittenden R. R. Co., Deficit Claim, 166 I. C. C. 548; Deficit Status of Elk & Little Kanawha R. R. Co., 180 I. C. C. 10.

[16] See Deficit Status of Abilene & Southern Ry., 72 I. C. C. 333; 79 I. C. C. 547; Deficit Status of Duluth, Winnipeg & Pacific Ry., 76 I. C. C. 689; Deficit Status of United Ry., 86 I. C. C. 661.

[17] Of the 461 claims filed, 180 in all were dismissed by action of the Commission. Annual Report of the Interstate Commerce Commission for 1931, p. 10.

Under § 204, the Commission exercises functions broader than those customarily conferred upon auditing or disbursing officers. It sits as a special tribunal to hear and determine the claims presented. Compare *Work* v. *Rives*, 267 U. S. 175, 182; *Great Northern Ry.* v. *United States*, 277 U. S. 172, 182. It renders a judgment upon a full hearing. In deciding any one of the enumerated questions of construction, as in other rulings of law or findings of fact, the Commission may err. The victim of the error may be either the carrier or the Government. Although the decision on the question of construction be favorable to the carrier, it may still fail to secure compensation, because there was, in fact, no deficit, whatever meaning be given to that word. On the other hand, an erroneous decision in favor of the carrier, on any of those questions, may result in the issue of a certificate and the payment thereunder of money which should not, and but for the error would not, be made. Since authority to pass upon the meaning of the word "deficit", and upon each of the other questions of construction, is essential to the performance of the duty imposed upon the Commission, and Congress did not provide a method of review, we hold that it intended to leave the Government, as well as the carrier, remediless whether the error be one of fact or of law. Compare *United States* v. *Great Northern Ry.*, 287 U. S. 144. The rule declared in *Wisconsin Central Railroad Co.* v. *United States*, 164 U. S. 190; *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112, is not applicable here. The decision in *Continental Tie & Lumber Co.* v. *United States*, 286 U. S. 290, is not inconsistent with this view.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.